Denver Law Review

Volume 44
Issue 1 *Symposium - Selected Problems on Law and the Individual*

Article 15

April 2021

# Vol. 44, no. 1: Full Issue

Denver Law Journal

# DENVER LAW JOURNAL

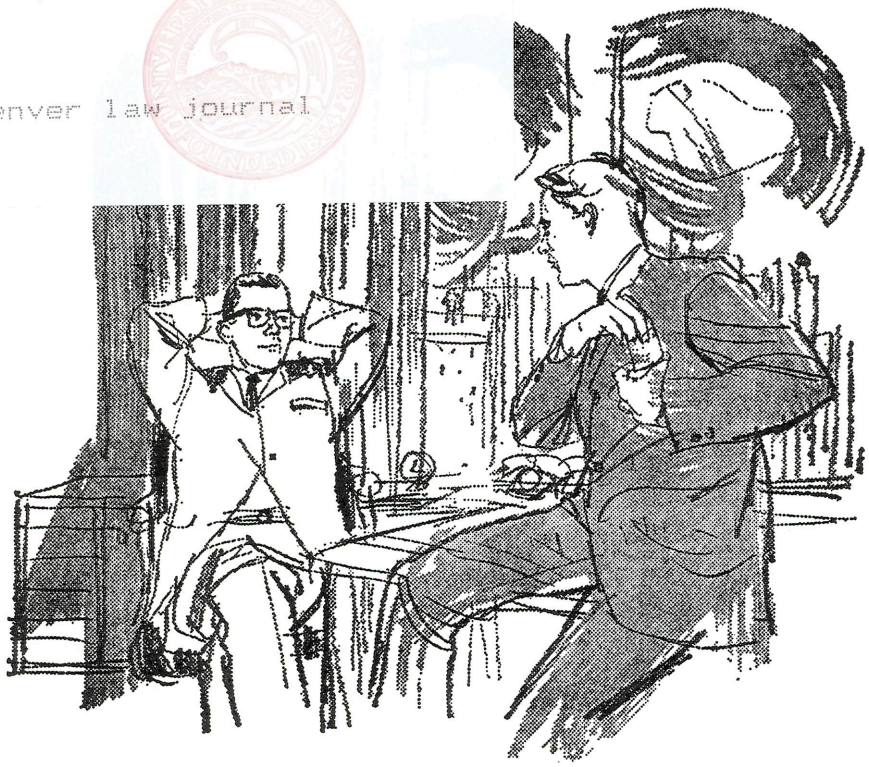
## VOLUME 44

## 1967

# DENVER LAW JOURNAL

VOLUME 44 WINTER 1967 NUMBER 1

*Member, National Conference of Law Reviews*



*Surprising, how much time I save these days . . .*

Now I know from personal experience how much time I can save with a co-ordinated research system, writes an attorney. He tells how this system answers questions more quickly by eliminating duplication of effort. If you are not satisfied with the speed with which you find answers, perhaps we can help you.

We don't have a research cure-all. But, we do have the Experience and Know-How that produced the greatest research system ever devised, one which includes the popular West Key Number System. Our research experts will show you how a truly co-ordinated system can save you more time than books with random cross references to other books.

Chances are, you will be pleasantly surprised at how easy it is to eliminate tiresome hours of research.

WEST PUBLISHING CO.
St. Paul, Minn. 55102

# DENVER LAW JOURNAL

VOLUME 44 WINTER 1967 NUMBER 1

## *ARTICLES*



## *NOTES*



Published quarterly and copyrighted 1966 by the Denver Law Journal and University of Denver College of Law, 200 West 14th Avenue, Denver, Colorado 80204. Subscription rates: $5.00 per year in the U.S., $6.50 per year in foreign countries. Individual copies: Regular issues $1.50, symposium issues $2.00.

Advertising agent: Articles and Business Editor, Denver Law Journal, 200 West 14th Avenue, Denver, Colorado 80204, 753-2651.

EDITOR'S NOTE:

# THE SYMPOSIUM—WHAT VALUE?

*This is the second in a series of remarks on the value and purpose of various segments of a law review.*

In Ancient Greece, a symposium was the discussion following a banquet or social gathering, at which there was a free interchange of ideas. Plato, in one of his dialogues, reported such a symposium on the subject of ideal love. Since that time the symposium has developed into a literary vehicle — a collection of opinions on a selected subject, having as its purpose a composite analysis of the significant aspects of that topic. Its value must be measured in terms of its ability to achieve that goal.

The most important element of the symposium is unity of theme. As in Plato's dialogue, the opinions of the different authors may vary, but throughout the symposium the theme appears, like a musical refrain, to weave their ideas into a single strand of legal inquiry.

The symposium is the one issue of a law review that can offer "scope" to legal journalism. Concentrating on a particular area within the vast sphere of legal activity, the symposium can probe the depths of interrelated problems and provide a compendium of inquiry and suggested resolution to issues involved. In more "established" areas of the law, the symposium can serve as a valuable research tool; a synthesis of important developments in that field.

Possessed of the qualities of unity and scope, the symposium need not always deal with single topics of substantive law. Instead, the law itself as an instrument of social order can be the subject of discussion. In this manner various substantive areas may be analyzed under a central guiding motif. This must be reflected in the symposium by an awareness of the needs of the present and the promises and problems of the future.

Limitation of an entire issue, or a major portion thereof, to a single topic poses obvious problems of soliciting articles which are not only valuable in themselves, but which contribute to the development of the central theme. However, it must also be remembered that the potential which can be tapped in the creation of a symposium is virtually without limit. Careful selection of a topic, judicious solicitation of articles from competent authors, and conscientious efforts to integrate each article into the total scheme will result in a truly valuable contribution toward a better understanding of the chosen area.

Thus, by the qualities of unity, scope and timeliness can the value of the symposium be measured as a contribution to legal education. As with so many other areas of endeavor, the challenge is great, but if overcome, the reward is of equal magnitude.

LOWELL J. NOTEBOOM

TIMOTHY B. WALKER

DENVER LAW JOURNAL

VOLUME 44 WINTER 1967 NUMBER 1

# SYMPOSIUM: SELECTED PROBLEMS ON LAW AND THE INDIVIDUAL—AN INTRODUCTION

SINCE the beginning of civilization man has been confronted with a two-sided problem of existence. The individual, aware that he is an entity in himself, with his own values and aspirations, finds, sometimes to his confusion, that he must live in conjunction with other individuals. This collection of human entities is called society, and it is the individual's "living" relationship with others of his kind that poses the enigma of his existence. The individual is faced with the problem of reconciling his own values to those collective values of society of which he is a member.

Many of society's values are expressed in the law, a formal set of rules or social norms of behavior. The law as an expression of social norms gives order and predictability to society. The formal law, manifested in statutes, judicial decisions, and administrative agency rulings, must not be viewed as an end in itself. It is only a means to an end; an instrument of social order. Its ultimate success or failure, therefore, must be measured in terms of its ability to reflect the current values of society.

In this context, one way to measure the success or failure of a particular law is in terms of its implementation and effect on the individual. In some cases the implementation may be incongruous with the stated purpose of the law. Then the practical effect is to pose problems for those directly affected as well as for those administering it. Likewise, ambiguity in goals or methods of enforcement may result in confusion rather than order in the social unit.

The amenability of society to change requires that law be flexible. Statutory and case law should not be considered as a final resolution to a given problem. The statute or decision may alter or interpret an existing rule or it may create new and additional issues. A continuing study of law in terms of its purpose and effect demonstrates the merits or shortcomings of the enunciated rule. The value of the law as a reflection of social norms can then be scrutinized from a practical viewpoint; if the goal is no longer desirable or attainable, the rule of law can be altered.

Studying law as the means to an end demonstrates the inter-

relationship of different forms that law assumes. The legislature delegates to an agency the authority to deal with particular problems within a prescribed policy and explicit guidelines. The agency, by attempting to carry out the particular legislative intent, establishes more specific rules within the statutory framework. The courts may be called upon to validate the legislative delegation or review particular agency determinations. At that time the power and duties of the agency may be extended beyond the initial legislative intent or they may be restricted to make the agency ineffectual. The rule of law in this situation results from a combination of the roles of these legal institutions. The rule therefore is constantly subject to review, and change frequently occurs because the application of the rule does not achieve the desired standard or end.

The Symposium articles discuss specific areas of law from the perspective of individuals affected by it. Emphasis is placed not upon what the law prescribes, but rather on how it affects the individual concerned. The areas of law discussed include child abuse legislation, the juvenile court system, aid to dependent children, unemployment compensation, administrative procedure, child custody, and the role of the personal injury attorney. Although clear delineation of the area of law and its objective is possible, its effect and the persons affected are not as easily identifiable. The articles of the Symposium reveal in a like manner that, although the objectives of a particular law may be clear, the ramifications of the rule in terms of the individuals it affects may exceed the intended objectives.

The articles selected are not intended to be all-inclusive. However, the selected topics do demonstrate the value of studying law as a dynamic force in relation to its effect on the individual. Such a study measures the effectiveness of the rule of law in achieving its objective of order in society. The attorney, judge, administrator, and legislator are peculiarly situated to benefit from this study, since as interpreters of the law and members of society, they are able to reshape the rule.

The awareness that law is dynamic and evolutionary — that merely having a statute on record or a case on point is the beginning of the study of law, not the point of termination — is the premise of this Symposium.

Frank F. Skillern
*Symposium Editor*

# CHILD ABUSE—THE LEGISLATIVE RESPONSE

BY VINCENT DE FRANCIS*

*The subject of Mr. De Francis' discussion is child abuse legislation, the so-called reporting laws. The goals of these laws are early identification and protection of the victim of abuse. Mr. De Francis, after presenting the scope of the child abuse problem, analyzes typical provisions of these laws. He compares the statutory provisions of different states and criticizes the laws in light of their purpose, implementation, and effect. Mr. De Francis concludes that the child abuse reporting laws are steps in the right direction, but that they alone are insufficient to resolve the child abuse problem. More and better child protective services are needed to help the child and the family.*

## INTRODUCTION

FEW recent social issues have aroused public sensibility or created as much concern as has the problem of child abuse. Public awareness demonstrates that it is a shocking reality and a growing problem which is common to every community. Cases of abuse stem from the seemingly well regulated home or the country club district as well as from the seriously disorganized or broken home from the slum area. These cases are not limited by the economic or educational level of the parents. While it is true that today more cases are being reported, this fact does not necessarily mean a rising incidence of child abuse. It does seem to reflect greater awareness of a problem which for too long has been ignored or neglected by the community at large.

Current public indignation at this gross disregard for the rights of children frequently results in punitive action against the parents who transgress societal ideals about family responsibility for children. In the progress of pursuing sanctions against offending parents, the need for constructive planning and for services on behalf of the abused child is often relegated to a secondary consideration or is completely overlooked.

Since no accurate national statistics on the incidence of child abuse exist, several studies serve as an index to the size of the problem. A study by the Children's Division of The American Humane Association in 1962,[1] reviewed cases of child abuse reported in United States newspapers. These cases represented the grossest types of child abuse — situations which were reported to law enforcement authorities and which were deemed "newsworthy" by the local press. The cases studied represent only that portion of child abuse

*Director of the Children's Division of the American Humane Association; admitted to practice in New York State in 1933; B.S., C.C.N.Y., 1929; LL.B., Fordham, 1932.

[1] De Francis, *Child Abuse — Preview of a Nationwide Survey* (1962).

incidence which was identified and reported. Educated estimates place the probable national incidence of serious child abuse at more than ten thousand cases a year. There are, no doubt, many additional thousands of cases in which the mistreatment is of less dangerous proportions.

## I. PURPOSE OF REPORTING LAWS

The need to discover and identify child victims of abuse required devising a casefinding tool such as the reporting law. Medical personnel came to be selected as the principal target group of the law's mandate because research and study could produce irrefutable evidence that child abuse can be determined by medical diagnosis.

The doctor is in a unique position in the child abuse case. Practitioners can exercise great care when examining children brought to them for treatment of injuries, and they do not have to accept unquestioningly glib stories about such injuries resulting from accidental cause. The use of x-rays and a study of all symptoms may reveal findings inconsistent with the history given and may provide the doctor with reasonable cause to suspect inflicted, rather than accidental, injury. Failure to recognize the "Battered Child Syndrome" could subject the child to additional or repeated injury and even death.

The logic and force of medical concern has focused attention on the doctor as probably the first responsible contact who has an opportunity to see and examine the child and the first competent person capable of assuming responsibility for positive action on behalf of the child. Thus, he is seen as the best resource for early identification and reporting of these cases.

But would doctors be willing to voice their suspicions by reporting these cases when the diagnosis of inflicted injuries was not clearcut, particularly in the face of denial by the parents? Would such reporting expose doctors to the possibility of a legal action for money damages? Would such reporting violate the privileged communication between doctor and patient?

The "reporting statute," requiring a report of a child abuse case and providing immunity from legal action to persons making such a report is the suggested answer to these questions. Proposed laws include waiver of the doctor-patient privilege and recommend waiver of the husband-wife privilege to enable one spouse to testify about abuse committed by the other.[2]

The core objective of the report under these laws is early identification of abused children so that they can be (1) treated for the present injuries and (2) protected from further abuse. Acquiring

[2] See § I, Waiver of Privilege at 35 *infra*.

proper treatment for the child poses no serious problem except in cases where parents, for religious or other reasons, may refuse permission for medical care. Such care can be obtained by invoking the authority of the court to order it despite parental objections.[3]

Protecting the child from future harm raises alternative solutions. This problem must take into consideration the community pattern for treating the situation which has evolved. The basic circumstances determining the ultimate pattern employed are the emotional climate in the community toward violators of the moral code, the rule of law and order, and the community awareness and understanding in terms of social planning in the best interests of children.

A. *Punishment of Parents*

As noted earlier, the general attitude toward the problem of child abuse is shock and anger. A natural consequence is a desire to exact retribution — to punish parents for their acts of cruelty. Where this philosophy prevails, reporting legislation is frequently viewed as a tool for identifying parents who mistreat children so that society may deal with them for the crime of child abuse.

Perhaps the only merit of this approach is that justice, in the sense of retribution, will be served. Counterbalancing this factor however, are many negative factors. Criminal prosecution requires proof through evidence which establishes the guilt of a defendant beyond a reasonable doubt. In child abuse cases the acts usually take place in the privacy of the home, and parents usually are mutually protective. Hence, evidence to sustain the legal burden of proof and to identify the offending parent is difficult to obtain. An unsuccessful prosecution may subject the child victim to increased hazards, for he will be exposed to the care of a parent who, in addition to his other problems, may now be embittered by his experience with police and court. A disturbed parent may view the prosecution's failure to find him guilty of child abuse as a license to continue to abuse.

Moreover, if the goal of the law is punishment, fear of a potential prosecution may cause a parent not to seek needed medical care for the child. The doctors may resist such a law if by so doing they automatically become involved as witnesses in a criminal proceeding against the parents. The doctor may dislike being placed in such a punitive role. The net result could be a defeat of the law's objective to encourage reporting and early casefinding.

An additional consideration is the fact that punishment does not correct the fundamental cause of the parents' behavior. If these parents have mental, physical, and emotional inadequacies, prosecu-

[3] *E.g.*, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

tion and punishment will not produce true change in their behavior. The basic motivational offender is even more unstable.

This critique is not meant to indicate that prosecution for child abuse is never permissible. Certainly the community has a duty to act against parents who commit crimes against children. But the decision of whether or not to prosecute in a given case should rest with the county prosecutor. In making this decision he must consider what happens to the children. No one making a decision to prosecute parents can afford to overlook the necessity of adequate planning for the abused child and other children in the family.

B. *Protection of the Child*

Another approach to the child abuse problem is rooted in a philosophy which sees the purpose of casefinding as the discovery of children who, because of abuse, need the care and protection of the community.

The community carries out this responsibility by making available the protective social services which will prevent further abuse of the child and meet the child's needs through social services and planning to assure maximum protection. Discovery of these children is achieved if the reporting is directed to the child protective program in the community.

Child protective programs are especially qualified to reach families where children are neglected or abused. Their functional responsibility requires that they: (1) explore and determine the facts of neglect or abuse; (2) assess and evaluate the damage to children; (3) initiate appropriate social work services to remedy the situation; and (4) invoke the authority of the juvenile court in those situations where removal from parental custody must be sought in the best interests of the children.

The "helping-through-social-services" philosophy is beneficial to the parent, since it recognizes that destructive parental behavior is symptomatic of deeper emotional problems. Rarely is child abuse the product of wanton, willful, or deliberate acts of cruelty, but usually is the result of emotional immaturity and lack of capacity for coping with the pressures and tensions of modern living. The symptoms of the parents' disorganized state are manifested in defiant behavior and bursts of violence or anger directed at other people, including their children.

Many of these parents may themselves have been victims of parental neglect or abuse and their behavior is a reflection of what they were exposed to as children. Most of them are not capable of providing adequate care for their children in the absence of outside help. These parents need services to guide and counsel them toward

accepting their responsibilities as parents, to rebuild their damaged personalities, and to give them the strength and stability to successfully live up to parental roles. A statute utilizing protective social services provides this skilled service to the parents, protects the child, and yet permits legal action through juvenile courts in extreme situations. Thus, this method attains punishment when necessary, but more importantly, it benefits the community, the family, and the child.

## II. Legislative Action

The attention of legislative bodies to the problem of child abuse has progressed at a pace with little precedent in recent legislative history. In the span of three legislative years since 1963, a total of forty-seven states enacted laws seeking reports of injuries inflicted on children.[4]

Some of the laws achieving passage in the three year period were hastily conceived and reflect public indignation against parents who abuse children. Most of them however, show awareness of the imperative need for protective social services on behalf of child victims.

These laws are characterized by many differences in form and substance. Some of the differences are minor and may be attributed to the differing administrative or organizational structure in each state. Other differences are more generic and reflect a variance in the philosophy of how to treat the problem of child abuse.

The laws also contain many areas of common agreement and areas of conformity with suggested legislation and guidelines developed by national agencies promoting mandatory reporting laws. The degree of conformity, the extent of common agreement, the stated or implied philosophy, and the strengths and weaknesses of the forty-seven enactments are reviewed and assessed in the analysis which follows.

### A. *Purpose*

The purpose clause of a statute is a declaration of state policy in regard to the subject matter of a specific law, or a statement which defines the intent sought to be served by a particular legislative act. The value of a purpose clause is that the legislature goes on record with an expression of the ultimate goal and objectives it seeks to achieve by the law. If any language of the act is ambiguous, the

[4] Since preparation of this article two more states and the United States Congress have adopted child abuse legislation. The following analysis does not include these laws. Hawaii presently is the only state having no reporting legislation. See Miss. Code Ann. § 7185 (Supp. 1966); Va. Code Ann. § 63-307 (Supp. 1966).

purpose clause may be resorted to for interpretation or resolution of the ambiguity.

Approximately one half of the states with reporting laws incorporated a purpose clause into their statutes. Table Number One identifies the states with, or without, a purpose clause.[5] The expression of intent is usually clear and unequivocal: to provide for the protection of children who have had physical injury or injuries inflicted upon them. While specific wording may vary, this idea is expressed in all the purpose clauses.

After defining the primary goal, the legislatures describe the mechanism which they intend to set in motion in response to a report of child abuse under the act. All twenty-three states having a purpose clause employ this or substantially similar language — causing the protective services of the state to be brought to bear in an effort to protect the health and welfare of these children and to prevent further abuses.

Colorado's reporting law injects the added concept of stabilizing family life by use of this phrase: "to . . . preserve family life wherever possible."[6] Thus, to the primary goal is added language which broadens the statute's scope and application.

Whether the objectives enumerated in the purpose clause are, in fact, achieved, will depend almost entirely upon the methods employed by the law in terms of the procedural patterns prescribed in the act. For the twenty-four states which did not include a statement

[5] TABLE NUMBER 1:

| | |
|---|---|
| States with Purpose Clause | Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, Washington, West Virginia. |
| States Without Purpose Clause | Alabama, Alaska, Arizona, California, Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, Wyoming. |

For reference to the purpose clauses, see the following statutes: ARK. STAT. ANN. § 42-801 (Supp. 1965); COLO. REV. STAT. § 22-13-1 (1963); DEL. CODE ANN. tit. 16, § 1001 (Supp. 1966); FLA. STAT. ANN. § 828.041(1) (1965); GA. CODE ANN. § 74-111(d) (Supp. 1965); IDAHO CODE ANN. § 16-1624 (Supp. 1965); IND. ANN. STAT. § 52-1419 (Supp. 1966); IOWA CODE ANN. § 235A.1 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-716 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); ME. REV. STAT. ANN. tit. 22, § 3851 (1966); MINN. STAT. ANN. § 626.554(1) (Supp. 1965); MONT. REV. CODES ANN. § 10-901 (Supp. 1965); NEV. REV. STAT. § 200.501 (1965); N.H. REV. STAT. ANN. § 571:25 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.1 (Supp. 1966); N.M. STAT. ANN. § 13-9-12 (Supp. 1965); OKLA. STAT. ANN. tit. 21, § 845 (Supp. 1966); R.I. GEN. LAWS ANN. § 40-13.1-1 (Supp. 1965); UTAH CODE ANN. § 55-16-1 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1351 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.010 (Supp. 1966); W. VA. CODE ANN. § 4904(80a) (Supp. 1965).

[6] COLO. REV. STAT. § 22-13-1 (1963).

of purpose in their reporting law, an analysis of procedural patterns will be made, not to evaluate the adequacy with which objectives are implemented, but for the purpose of interpreting intent with regard to objectives. Lacking a definition of legislative intent, a study of the prescribed procedures will provide clues to help determine the probable purpose sought to be attained by the law and to assess priorities in objectives.

B. *Jurisdiction*

For a situation to fall within the scope of the law's obligation to report, it must comply with the two jurisdictional elements found in the statutes: the age of a child subject to reporting and the existence of abuse or injury conforming to stated criteria.

1. Age

Considerable variation appears in the upper age limit used by the states in defining the age of the child coming within the protection of the reporting law. Four states limit reporting to children under age twelve; three states use the term "minor." Two states use the term "child" or "any child." Where a specific age is not used the law must be read in terms of other state law defining the terms. In the usual instance a person is considered to be a minor child until age twenty-one. Table Number Two shows the age limits used by the forty-seven states.[7]

[7] TABLE NUMBER 2:

| Age | States |
|---|---|
| Under 12 | Colorado, Georgia, Missouri, Oregon |
| Under 16 | Alabama, Alaska, Arizona, Arkansas, Florida, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Tennessee, Vermont |
| Under 17 | Louisiana, Michigan, Oklahoma |
| Under 18 | Connecticut, Delaware, Idaho, Iowa, Kentucky, Montana, Nevada, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, West Virginia |
| Under 19 | Wyoming |
| Other | California-minor; Minnesota-minor; Nebraska-any child, incompetent, or disabled person; Utah-minor; Wisconsin-child. |

The applicable age limits in the various states are found in the following statutes: ALA. CODE tit. 27, § 21 (Supp. 1965); ALASKA STAT. § 11.67.070 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01(E) (Supp. 1966); ARK. STAT. ANN. § 42-802 (Supp. 1965); CAL. PEN. CODE § 11110 (West Supp.); COLO. REV. STAT. § 22-13-3 (1963); CONN. GEN. STAT. ANN. § 17-38a(a) (Supp. 1965); DEL. CODE ANN. tit. 16, § 1002 (Supp. 1966); FLA. STAT. ANN. § 828.041(2) (1965); GA. CODE ANN. § 74-111(a) (Supp. 1965); IDAHO CODE ANN. § 16-1625(c) (Supp. 1965); ILL. ANN. STAT. ch. 23, § 2041 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1420 (Supp. 1966); IOWA CODE ANN. § 235A.2 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-714 (Supp. 1965); KY. REV. STAT. ANN. § 199.335(2) (Supp.

No indication is shown of the factors which were considered by the drafters when they determined the specific age limits contained in the law. One can only conjecture about what criteria they employed. In states where reporting is limited to children under twelve, a possible consideration could have been the notion that children over twelve are able to defend themselves or can speak for themselves. The validity of this concept is challenged by the fact that some children over twelve are mentally retarded or emotionally disturbed, handicapping conditions which would make them as vulnerable as children under twelve. Nebraska recognized this problem by bringing into the reporting law's jurisdiction "any child, or any incompetent or disabled person . . . ."[8]

The other age limits of sixteen, eighteen, or nineteen were probably chosen to bring the reporting act into conformity with the jurisdictional age limits of the juvenile court in dependency and neglect cases. Age limits based on juvenile court jurisdiction seem most logical because the court is a valuable resource which may have to be invoked on behalf of the child by the protective social services in circumstances of acute risk and hazard.

2. Abuse or Injury

The other important element which brings a situation within the purview of the law is the existence of injury inflicted on a child. As with age, great variance exists in the language used to define this jurisdictional element. Nonetheless, common factors were found in the definitions of this element in every statute but one.

First is the concept that the diagnosis of inflicted injury does not have to be conclusive. The person reporting the case does not have to resolve any doubts he may have as to the true cause of the injuries. Thus if he suspects that the injuries may have been inflicted,

---

1966); LA. REV. STAT. ANN. § 14:403A (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3852 (Supp. 1966); MD. ANN. CODE art. 27, § 11 A (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(1) (Supp. 1965); MINN. STAT. ANN. § 626.554(1) (Supp. 1966); MO. ANN. STAT. § 210.105(1) (Supp. 1966); MONT. REV. CODES ANN. § 10-902 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 1; NEV. REV. STAT. § 200.502(1) (1965); N.H. REV. STAT. ANN. § 571:26 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.3 (Supp. 1966); N.M. STAT. ANN. § 13-9-13 (Supp. 1965); N.Y. PEN. LAW § 483-d; N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-01 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 846 (Supp. 1966); ORE. REV. STAT. § 146.740(2) (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); R.I. GEN. LAWS ANN. § 40-13.1-3(1) (Supp. 1965); S.C. CODE ANN. § 20-302.1 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 1; TENN. CODE ANN. § 37-1201 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 695c-2(1) (Supp. 1966); UTAH CODE ANN. § 55-16-2 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1352 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1966); W. VA. CODE ANN. § 4904(80b) (Supp. 1965); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. § 14-28.1 (1965).

[8] Neb. Sess. Laws 1965, ch. 206, § 1.

he has an obligation to report. The various phrases used are shown in Table Number Three.[9]

The second general factor relates to a description or definition of the circumstances, in terms of the child's condition, which warrant the report. This factor has two components. One relates to the pres-

[9] TABLE NUMBER 3:

| Wording to define "suspicion of inflicted injury" | States |
|---|---|
| "has reasonable cause to suspect" | Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maine, New Hampshire, New Jersey, Oregon, South Dakota, Vermont |
| "has reason to believe" | Alaska, Iowa, Kansas, Maryland, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, Wyoming |
| "having reasonable or just cause to believe" | Delaware, Illinois, Massachusetts, Missouri, South Carolina, Wisconsin |
| "of such nature as to reasonably indicate" | Alabama, Tennessee |
| "whose examination disclosed evidence. . . not explained by medical history as being accidental in nature" | Arizona, Indiana, North Dakota |
| "injuries which were, or may have been intentionally inflicted" | Michigan |
| "injuries which appear to have been caused" | Idaho, Minnesota |

For precise phraseology used by the states, see the following statutes: ALA. CODE tit. 27, § 21 (Supp. 1965); ALASKA STAT. § 11.67.010 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01 (Supp. 1966); ARK. STAT. ANN. § 42-802 (Supp. 1965); CAL. PEN. CODE § 11161.5 (West Supp.); COLO. REV. STAT. § 22-13-3 (1963); CONN. GEN. STAT. ANN. § 17-38a(a) (Supp. 1965); DEL. CODE ANN. tit. 16, § 1001 (Supp. 1966); FLA. STAT. ANN. § 828.041(2) (1965); GA. CODE ANN. § 74-111(a) (Supp. 1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); ILL. ANN. STAT. ch. 23, § 2042 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1420 (Supp. 1966); IOWA CODE ANN. § 235A.3 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-717 (Supp. 1965); KY. REV. STAT. ANN. § 199.335(2) (Supp. 1966); LA. REV. STAT. ANN. § 14:403A (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3852 (Supp. 1966); MD. ANN. CODE art. 27, § 11A(c) (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(1) (Supp. 1965); MINN. STAT. ANN. § 626.554(2) (Supp. 1966); MO. ANN. STAT. § 210.105(1) (Supp. 1966); MONT. REV. CODES ANN. § 10-902 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 1; NEV. REV. STAT. § 200.502(1) (1965); N.H. REV. STAT. ANN. § 571:26 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.3 (Supp. 1966); N.M. STAT. ANN. § 13-9-13 (Supp. 1965); N.Y. PEN. LAW § 483-d(1) (Supp.); N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-01 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 846 (Supp. 1966); ORE. REV. STAT. § 146.750(1) (1965); R.I. GEN. LAWS ANN. § 40-13.1-3(1) (Supp. 1965); S.C. CODE ANN. § 20-302.1 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 1; TENN. CODE ANN. § 37-1202 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 695c-2(1) (Supp. 1966); UTAH CODE ANN. § 55-16-2 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1352 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1966); W. VA. CODE ANN. § 4904(80b) (Supp. 1965); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. § 14-28.1 (1965).

ence of an injury; the second, to the cause of that injury. Table Number Four shows the grouping of states by these components.[10]

Table Number Four reveals that there are two broad patterns into which fall more than two-thirds of the statutes. Group I uses wording which clearly juxtaposes the condition and cause — condition, "physical injury or injuries"; cause, "by other than accidental means." The states in Group II accomplish this juxtaposition but with different wording. Instead of "by accidental means," there is substituted the phrase, "as a result of abuse or neglect." The states in Group III merely combine the wording which is used by the other two groups. Texas substitutes "maltreatment" for the word "abuse."

The states in Group IV introduce distinctly new concepts. New Mexico and South Dakota introduce the notion of malnutrition.

[10] TABLE NUMBER 4:

| Condition and Cause | States |
|---|---|
| I. Physical injury (or injuries) other than by accidental means | Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Missouri, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, Vermont, Wisconsin, Wyoming |
| II. Physical injury as a result of abuse or neglect | Alabama, Alaska, Idaho, Illinois, Kansas, Nevada, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, West Virginia |
| III. Injury other than by accidental means, result of abuse or neglect | Arkansas, Minnesota, Texas |
| IV. Introduce new concepts | Arizona, California, Iowa, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Mexico, Pennsylvania, South Dakota, Washington |

Statutory references: ALA. CODE tit. 27, § 21 (Supp. 1965); ALASKA STAT. § 11.67.010 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01 (Supp. 1966); ARK. STAT. ANN. § 42-802 (Supp. 1965); CAL. PEN. CODE § 11161.5 (West Supp.); COLO. REV. STAT. § 22-13-1 (1963); CONN. GEN. STAT. ANN § 17-38a(a) (Supp. 1965); DEL. CODE ANN. tit. 16, § 1001 (Supp. 1966); FLA. STATE ANN. § 828.041(2) (1965); GA. CODE ANN. § 74-111(a) (Supp. 1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); ILL. ANN. STAT. ch. 23, § 2042 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1420 (Supp. 1966); IOWA CODE ANN. § 235A.3 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-717 (Supp. 1965); KY. REV. STAT. ANN. § 199.335(2) (Supp. 1966); LA. REV. STAT. ANN. § 14:403A (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3852 (Supp. 1966); MD. ANN. CODE art. 27, § 11A(c) (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(1) (Supp. 1965); MINN. STAT. ANN. § 626.554(2) (Supp. 1966); MO. ANN. STAT. § 210.105(1) (Supp. 1966); MONT. REV. CODES ANN. § 10-902 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 1; NEV. REV. STAT. § 200.502(1) (1965); N.H. REV. STAT. ANN. § 571:26 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.3 (Supp. 1966); N.M. STAT. ANN. § 13-9-13 (Supp. 1965); N.Y. PEN. LAW § 483-d(1) (Supp.); N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-01 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 846 (Supp. 1966); ORE. REV. STAT. § 146.750(1) (1965); PA. STAT. ANN. tit. 18, § 4330(a) (Supp. 1965); R.I. GEN. LAWS ANN. § 40-13.1-3(1) (Supp. 1965); S.C. CODE ANN. § 20-302.1 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 1; TENN. CODE ANN. § 37-1202 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 695c-2(1) (Supp. 1966); UTAH CODE ANN. § 55-16-2 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1352 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1966); W. VA. CODE ANN. § 4904(80b) (Supp. 1965); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. § 14-28.1 (1965).

New Mexico treats this factor as a cause of injury, whereas South Dakota considers it a condition. Washington adds a new element — sexual abuse as a cause for the injury.

Massachusetts does not relate the injury to a defined cause, but ties it to the act of a perpetrator; the wording "inflicted by a parent" would seem to imply that the act be willful because it connotes an act of commission. Four states inject the element of willful intent and, in contrast to Massachusetts, leave no doubt as to their meaning. Michigan provides, "who has physical injuries . . . *intentionally* inflicted . . . ."[11] Montana directs, "has had serious injury or injuries inflicted upon him . . . as a result of abuse or neglect, or has been *willfully neglected* . . . ."[12] Iowa provides, "has had physical injury . . . as a result of abuse or *willful neglect* . . . ."[13] Oregon uses strong language to define the element of intentional or willful act. Injury is defined as "any physical injury to a child of the age of twelve or under caused by blows, beatings, physical violence or abuse where there is some cause to believe that such physical injury was intentionally or wantonly inflicted and includes wanton neglect, as revealed by a physical examination, which leads to physical harm to the child."[14]

Arizona, California, Maryland, Nebraska and Pennsylvania fall into a special category. These states incorporated the reporting law into their penal codes, and the circumstances or conditions for reporting are tied to the concept of crimes and punishments.

Arizona first defines the crime of permitting the life, health or morals of a minor "to be imperiled, by *neglect, abuse* or immoral associations . . ."[15] and prescribes the punishment for this misdemeanor. The next subsection of this law is the reporting act which seeks reporting by "any physician . . . whose examination of any minor discloses evidence of injury or *physical neglect*."[16]

California's 1965 amendment to its 1963 reporting law leaves the act in the penal code. The connotation of crimes and punishments is clearer in the amended law than it was in the earlier one. Deleted by the amendment is the provision for reporting to the nearest child welfare agency offering child protective services. In its place the District Attorney's Office was substituted. Since the role of the district attorney is to evaluate cases for purpose of prosecution, the direction

[11] MICH. STAT. ANN. § 14.564(1) (Supp. 1965). (Emphasis added.)
[12] MONT. REV. CODES ANN. § 10-902 (Supp. 1965). (Emphasis added.)
[13] IOWA CODE ANN. § 235A.3 (Supp. 1965). (Emphasis added.)
[14] ORE. REV. STAT. § 146.710(2) (1965).
[15] ARIZ. REV. STAT. ANN. § 13-842 (Supp. 1966).
[16] ARIZ. REV. STAT. ANN. § 13-842.01(A) (Supp. 1966).

which the law now takes is clearly in terms of handling reports of child abuse as reports of a crime.

An added factor to strengthen this assessment of the California law is the enactment of a new section which mandates copies of child abuse reports to be filed with the State Bureau of Criminal Identification. While this may be seen as a service in the nature of a central registry, with all of the benefits accruing from a central index (*i.e.,* an aid in medical diagnosis, etc.), placing the service in this Bureau adds confirmation to the assumption that child abuse is viewed as a crime.

The Maryland law, first defines the crime of child abuse as "Any parent, adoptive parent or other person who has the permanent or temporary care or custody . . . of a minor child under the age of sixteen years who maliciously beats, strikes or otherwise mistreats such minor child to such degree as to require medical treatment for such child shall be guilty of a felony . . . ."[17] It then describes the child whose condition must be reported as a child brought for treatment "under circumstances which indicate violation of the foregoing [penal act]."

In the Nebraska statute reportable injury and cause are identified by the phrase, "severe physical injury . . . willfully inflicted upon any child . . . ."[18] The context of the law and the spelling out of a willful act leave no doubt as to the nature of the report as a report of a crime.

Pennsylvania's statute is a subsection of the penal law requiring medical practitioners to report situations where any person is brought for treatment "suffering from any wound or other injury inflicted . . . by means of a knife, gun, pistol or other deadly weapon, or in any other case where injuries have been inflicted . . . in violation of any penal law . . . ."[19]

Although, it was not listed with this group because its application is other than merely the reporting of a crime, New York's law is also found in the penal code. The factor which removes reporting from the connotation of crimes and punishments inherent in the penal code is the law's direction that reports be made to resources not specifically identified with law enforcement. Reports of child abuse injuries are made "to a society for the prevention of cruelty to children or other duly authorized child protective agency or to a public welfare official . . . ."[20] The clear intent is non-

[17] MD. ANN. CODE art. 27, § 11A(a) (Supp. 1966).

[18] Neb. Sess. Laws 1965, ch. 206, § 1.

[19] PA. STAT. ANN. tit. 18, § 4330(a) (Supp. 1965).

[20] N.Y. PEN. LAW § 483-d(1) (Supp.).

punitive and is designed to invoke social services on behalf of the reported children.

Several types of injuries may remain outside the statutory definitions of injuries. The child suffering from malnutrition has been described medically as the infant who fails to thrive. Although it is a different kind of neglect and abuse, the dangers to children subjected to it are as acute as the worst type of child battering. But only two states have included such injury under the reporting law. These provide that reportable events include "injury or injuries inflicted . . . as a result of abuse, neglect or starvation." The South Dakota statute contains the phrase, "having reasonable cause to suspect that any child . . . has been starved or has had serious physical injury . . . ."[21]

Such provisions are worthy of commendation. The child whose health is seriously jeopardized by neglect or abuse resulting in malnutrition should also be the subject of the reporting law. Since the medical profession is the primary target group for reporting legislation, medical personnel are the logical and most qualified people to make this specific diagnosis and report these cases.

C. *Nature of Abuse or Injury*

The question of whether the injury must be willfully inflicted before it is reportable warrants further consideration. A number of states seem to take the position that to be reportable the injury to children must be willfully or intentionally inflicted. While the legislation in Michigan, Montana and Oregon is not found in the penal law, these states clearly identify with the group which relates the reporting law to situations of willful or intentional injury.

A number of other states may be classed with the "willful intent" group because their statutory language is subject to that interpretation. Alabama law specifies "any wound or injury which . . . appears to be unusual or of such a nature (so as) to indicate . . . [it]was caused by physical abuse, child brutality, child abuse or neglect."[22] The coupling of child abuse with child brutality may infer either an intention to distinguish between the two or to identify them as synonymous. If the latter, then willful intent is implied.

Similarly, Utah's phrasing of "unusual or unreasonable physical abuse or neglect" may, by implication, be interpreted to mean a deliberate or intentional act. In the same vein is Iowa's legislative language which says, "abuse or willful neglect." Here, abuse is coupled with willful neglect implying that both are intentional.

In contrast, a large block of states evade the question of intentional injury by the use of the term, "as a result of abuse or neglect."

---

[21] S.D. Sess. Laws 1964, ch. 90, § 1.

[22] ALA. CODE tit. 27, § 21 (Supp. 1965).

Whether the terms "abuse" and "neglect" carry an implication of willful intent is debatable. Both, of course, may be intentional, but they need not be. Abuse may be defined as "physically harmful treatment."[23] A parent may treat a child badly or mistreat him without truly intending to cause injury. For example, the classic medical illustration of the battered child syndrome is a fracture of the arm caused by dragging or lifting a child by the arm, thereby twisting and breaking it. While this type of handling results in mistreatment and injury, there may be no intention to hurt the child. The action may be careless and thoughtless, but not intentional in the legal sense.

Nor is the term "neglect" intentional in the legal sense. Neglect is defined as "not to care or attend to [something] sufficiently or properly; or to fail to carry out [an expected or required action] through carelessness or by intention."[24] Child neglect is usually unintentional and a product of carelessness or functional inadequacy. Lending force to the argument that intent may not necessarily be ascribed, even by implication, to an act of abuse or neglect is additional language in some statutes. Montana catagorizes the acts as abuse or neglect or willful neglect,[25] clearly introducing intent in the latter cattegory. Utah describes the acts as "unusual or unreasonable physical abuse or neglect . . . ."[26] This language indicates a higher degree of culpability than with acts of abuse or neglect.

Thus, except for the states where willful intent is defined or implied as a necessary element of the injury to the child, the injury which must be reported need not result from a deliberate act of commission or omission. All that is required is an injury to the child resulting from some act, or from an omission, without regard to intent. This conclusion is supported by the statutory language defining reportable injuries as an "injury or injuries caused other than by accidental means." That language excludes from mandatory reporting only such injury as may properly be attributed to accident. Excluded would be accidents such as a fall from a crib or from a chair or down a flight of stairs. But if any suspicion exists concerning the truth of the history given in regard to accidental cause, the suspicion must be resolved in favor of reporting.

### D. *Identify Perpetrator of Abuse*

Many states introduced the requirement that the reporting source identify the perpetrator of the act. The perpetrator must fall within a class of persons responsible for the care of the child. Phraseology

---

[23] WEBSTER, THIRD NEW INT'L DICTIONARY (14th ed. 1961).

[24] *Ibid.*

[25] MONT. REV. CODES ANN. § 10-902 (Supp. 1965).

[26] UTAH CODE ANN. § 55-16-2 (Supp. 1965).

such as "by parent or caretaker," or "by a parent, step-parent, legal guardian or any other person having custody" requires that the person be identified.

Meeting this requirement places the reporter in an accusatory role — particularly in states where intentional infliction of injury must also be spelled out. It is far less demanding upon the reporting source to report only cases where the circumstances are suspicious — where, if he is a doctor, he cannot reconcile the symptoms with the history — without the necessity to identify either intent or perpetrator. Making the simpler, nonaccusatory report does not require the doctor to struggle with his conscience or with ethical considerations. Those problems will arise and will become acute if he has to point a finger at a parent as the willful perpetrator of the injury. Table Number Five groups the states according to their requirements on this point.[27]

The philosophy requiring a nonaccusatory report was adopted in nine states. In those states, the report need recite only the suspicion of inflicted injury without identification of who did it.

[27] TABLE NUMBER 5:

| Type of Report | States |
|---|---|
| Non-accusatory | Alabama, Alaska, Arizona, Illinois, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin |
| Accusatory | Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Rhode Island, South Carolina, South Dakota, Vermont, Wyoming |

The type of report required can be found in the following statutes: ALA. CODE tit. 27, § 21 (Supp. 1965); ALASKA STAT. § 11.67.010(a) (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01 (Supp. 1966); ARK. STAT. ANN. § 42-802 (Supp. 1965); CAL. PEN. CODE § 11161.5 (Supp.); COLO. REV. STAT. § 22-13-3 (1963); CONN. GEN. STAT. ANN. § 17-38a(a) (Supp. 1965); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); FLA. STAT. ANN. § 828.041(2) (1965); GA. CODE ANN. § 74-111(a) (Supp. 1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); ILL. ANN. STAT. ch. 23 § 2044 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1420 (Supp. 1966); IOWA CODE ANN. § 235A.4 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-717 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); LA. REV. STAT. ANN. § 14:403A (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3852 (Supp. 1966); MD. ANN. CODE art. 27, § 11A(c) (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(1) (Supp. 1965); MINN. STAT. ANN. § 626.554(2) (Supp. 1966); MO. ANN. STAT. § 210.105(1) (Supp. 1966); MONT. REV. CODES ANN. § 10-902 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 1; NEV. REV. STAT. § 200.503(2)(e) (1965); N.H. REV. STAT. ANN. § 571:27 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.3 (Supp. 1966); N.M. STAT. ANN. § 13-9-12 (Supp. 1965); N.Y. PEN. LAW § 483-d; N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-01 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 846 (Supp. 1966); ORE. REV. STAT. § 146.710(2) (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); R.I. GEN. LAWS ANN. § 40-13.1-3(1) (Supp. 1965); S.C. CODE ANN. § 20-302.1 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 2; TENN. CODE ANN. § 37-1202 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 695c-2(1) (Supp. 1966); UTAH CODE ANN. § 55-16-2 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1352 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.030(1) (Supp. 1966); W. VA. CODE ANN. § 4904(80b) (Supp. 1965); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. § 14-28.2 (1965).

The basic question is whether a child has been injured as a result of some cause other than that given in the child's medical history. Whether the injury was inflicted intentionally or resulted from an act of commission or omission without deliberate intention to injure should not be material for purposes of reporting, if the root objective is to protect the child from further injury. Nor is it important to identify at the time of report who perpetrated the injury. The questions of intent and identity of the offender become material only in regard to the action taken by the community after a report is made. Both would be important issues in the communities where punitive action is initiated against the offender. But in communities where the action is directed toward providing protective social services and taking remedial steps to protect the child and change neglectful or abusive behavior in the home, these issues are of minor concern.

In the last analysis, however, it is more important that the person or institution making the report should not be burdened with the responsibility for evaluating whether the suspected injury was willfully or intentionally inflicted, or to point to the possible offender. The reporting source should be charged only with responsibility for reporting such injuries which probably are not the result of an accident. After ruling out the probability of accident the reporting source should be free of any other obligation for further diagnosis. All other determinations must be the responsibility of the community resource designated to receive the report and investigate the circumstance in more detail.

## III. IMPLEMENTATION OF THE CHILD ABUSE STATUTES

The states have adopted various means for achieving the stated goals of the reporting laws. The means of implementing the acts will be analysed and assessed in light of the purpose of the act.

### A. *Source of the report*

All but three of the forty-seven statutes designate the medical profession as the principal target group of reporting legislation. Medical practitioners constitute the most logical and responsible group to come in contact with children whose injuries require treatment. They are also the most competent to make the diagnosis that an injury was probably not caused by accident.

However, the statutory language designating who falls into the category of the medical profession has many differences. The terms used to define who in the medical field are covered by the law range

from the simple statement, "any physician" (Maryland, Michigan, Texas, and Missouri), to a detailed enumeration such as is used in Illinois, "any physician, surgeon, dentist, osteopath, chiropractor, podiatrist or Christian Science practitioner." Many states include a phrase about hospital personnel such as "any interne, resident physician, hospital superintendent or manager, or any nurse, pharmacist and laboratory technician." Common to a majority of the states is inclusion of a provision which fixes responsibility for reporting in a hospital setting. Specifically, this provision provides that where the attending physician is treating the child while on hospital service he shall notify the person in charge of the hospital or his designated delegate who shall take responsibility for the report.

The three states which do not follow the general patterns are Nebraska, Tennessee, and Utah. These states impose responsibility for reporting on *any person* having knowledge (Tennessee); or "having cause to believe" (Utah); or "having reason to believe" (Nebraska) that injury has been inflicted.

In addition to requiring reporting from medical personnel, a number of states included other professional groups. Alabama, Kansas, and Alaska added social workers and school teachers to the reporting group. Ohio and West Virginia also included social workers, visiting nurses and teachers, but they qualified their responsibility by the phrase, "acting in their official capacity."

Nevada is even more inclusive; in addition to the medical group it lists social workers, teachers, school authorities, attorneys, and clergymen. New Mexico adds social workers, visiting nurses, teachers, and ordained ministers of any established church.

North Carolina limits the term "social worker" to employees of county departments of welfare and substitutes "school administrators" for "teachers." Wisconsin retains the broader category of "social workers" but also uses the phrase "school administrators" in place of the more frequently used "teachers."

South Carolina and South Dakota use categories unique to themselves. South Carolina adds to the general description of medical personnel "medical officers of the United States on duty in this State . . . ."[28] South Dakota says, "or any law enforcement officer. . . ."[29]

Broadening the law's coverage, in terms of who reports, results

[28] S. C. CODE ANN. § 20-302.1 (Supp. 1965).

[29] S.D. Sess. Laws 1964, ch. 90, § 1.

in putting into legislative mandate the moral obligation of citizens to come to the aid of neglected, abused, and exploited children by invoking in their behalf the protective social services of the community. Nebraska, Tennessee, and Utah implement the concept that casefinding is an obligation of all citizens by carrying the idea to its logical conclusion. Their laws direct that *any* person having knowledge of child abuse is required to report. Universal application of the law would assure appropriate protection of the maximum number of children. The simplicity with which they designate who must report makes the obligation an unavoidable duty of all responsible persons with knowledge or suspicion of specific instances of child abuse.

Realistically, and as a matter of practical experience, members of the helping professional disciplines are more likely to respond to that duty. This would be true not only because their professional ethics would not permit them to ignore a serious responsibility, but also because their duties would place them in frequent contact with children and afford them greater opportunity to see and observe signs of neglect and abuse. Yet the national experience of Child Protective Service agencies documents the fact that a large proportion of reports of child neglect or abuse come from non-professional sources.[30] Common sources of original reports are relatives, neighbors, and friends. These people have reported in the past without benefit of the immunity which modern reporting law provides for those who report in good faith. The reporting law, with its immunity protections, would probably encourage even more reporting from these non-professional sources.

B. *Mandatory or Permissive Reporting*

Reporting legislation is a device for compelling or inducing persons with knowledge of suspected child abuse to report the facts to the agency designated by the law. Consensus favors the concept of mandatory legislation. Forty-one of the forty-seven states made their law mandatory. Six states — Alaska, Missouri, New Mexico, North Carolina, Texas and Washington — passed permissive reporting laws.

What can be said for the permissive law is that it may induce some reporting sources to report because of the immunities granted

[30] Child Protective Services have been in existence in some communities since 1875. See THE AMERICAN HUMANE ASSOCIATION, THE FUNDAMENTALS OF CHILD PROTECTION (1955).

by the law. But, regardless of the protections which the law provides for those who do report, the choice to report is theirs to make. Under a permissive law the decision will probably be based on the personal convictions and personal convenience of the potential reporter rather than on the consequences to the child if the report is not made.

Supporters of permissive legislation advance another argument to justify their position. Under mandatory reporting, they say, parents who abuse children may be deterred from seeking medical treatment for the child because they know the doctor must report the case. The argument is specious and falls of its own weight. If fear of exposure through mandatory reporting is a deterrent, it is not cured by a permissive law. An abusing parent will not know, until after he has brought a child for treatment, whether the doctor will exercise his option to report under permissive legislation. His doubts about the consequences of seeking treatment could be an equally deterring factor whether the law is mandatory or permissive.

The better answer probably lies in a combination of mandatory reporting and a broadened base of reporting sources to include other than the medical profession. With the parent subject to possible exposure by other than medical sources, he will probably want to minimize the effects of his abuse by taking the child for treatment as soon as possible. Only if the reporting law is made mandatory can we be sure that no child, identified as needing protection, is left unaided. To make the law permissive emasculates its intent and purpose. It results only in suiting the convenience of the reporting source and, too often, may fail to bring protection to children in grave hazard.

### C. *Time for Report*

An overwhelming majority of the states emphasize the importance of urgent action in reporting suspected inflicted injury. Usual language is the phrase, "an immediate oral report shall be made by telephone or otherwise." Another common phrase is "forthwith by telephone or otherwise." Most of the states calling for an immediate oral report have the added requirement that this be "followed by a report in writing." Specific time limits are not usually indicated with one exception — Delaware. In that state the person reporting is to report not later than three days after the discovery.[31]

[31] DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966).

Idaho, Maryland, Nebraska and North Carolina do not define how the report is to be made; Massachusetts does not specify as to oral or written report but directs that it be made in accordance with the rules of the Department of Public Welfare. Florida and North Dakota direct that the report be in writing. However, North Dakota adds the qualification that if the circumstances are such as to warrant immediate action it shall be made orally by telephone or otherwise. California says the report shall be made "by telephone and in writing." Kansas, Montana, New Mexico, and West Virginia require the report to be in writing but, "if it is not in writing, in the first instance, it shall be reduced to writing as soon as may be after it is made orally by telephone or otherwise."

D. *Contents of the Report*

Most states adopted, in whole or part, the suggested language of the several model acts regarding the necessary contents of the report. These acts were proposed by national agencies promoting reporting laws. Essentially, the information sought in the report is:

1. The name and address of the child;
2. The name and address of the child's parents;
3. The nature or extent of the injuries;
4. Evidence of previous injuries and the nature and extent of previous injuries; and
5. Any other information which in the opinion of the physician may be helpful in establishing the cause of the child's injuries and the identity of the perpetrator.

Six states — Idaho, Maryland, Massachusetts, Nebraska, New York, and Wisconsin — do not define the area of content in the reporting law.

E. *Recipient of the Report*

A critical determination for the lawmakers is the decision about which resource to designate for receiving reports of child abuse. On this important decision rests the effectiveness of the reporting law in achieving the goals cited in its purpose clause. The right choice will bring into play the appropriate resources. A poor or bad choice may produce results not contemplated by the law. For example, if the declared legislative intent is to make available the protective social services to prevent further abuse, safeguard and enhance the welfare

of such children, and to preserve family life wherever possible, the logical procedure, consistent with the stated goals, would be to immediately invoke the services of the social agency charged with that special function. Reporting them should be directed to specific child protective agencies or to the department of public welfare, where child protective services are a functional responsibility of its child welfare unit. As a second line of protective social services, an appropriate designation to receive reports could be the family or juvenile court. Either referral would involve a psycho-social investigation of each case, with evaluation of the circumstances surrounding each act reported. The needs of the child victim, the possibility of continuing hazard to the child, *and the risk to other children in the family,* would be assessed. Also evaluated would be the potential for a social work treatment of the problem to achieve all the goals defined in the statement of purpose. If a study of the case shows need to assure protection of the child by removal from parental custody, the authority of the juvenile court could be readily brought into play by the protective service agency or the court's own probation staff.

On the other hand, given the same declaration of purpose as above, a reaching of the objectives hampered, if not defeated, by selection of some other resource to receive reports. If, for example, the legislature were to designate a law enforcement agency to receive the report, that choice would not be consonant with the declared intent. A law enforcement agency might be the police or the sheriff or the prosecuting attorney of the community. Their orientation, their functional responsibilities, and their modus operandi are not in tune with the legislative intent of "invoking the protective social services." Such a choice would be more compatible with a legislative intent to view the occurrence in terms of crimes and punishments. Social services are not a component of the law enforcement agency. Law enforcement personnel are trained to investigate and oriented to determine whether a crime has been committed. While some personnel in large police forces are given special training as juvenile officers, these constitute but a minute proportion of the country's police force. Thus, reporting to law enforcement agencies gives little assurance that such reporting will, in fact, invoke protective social services.

1. Pattern in Statutes with Purpose Clause.

Table Number Six represents the reporting pattern in the twenty-

four states having a purpose clause in their reporting statute.[32] In

[32] TABLE NUMBER 6:

| Purpose | State | Report to: |
|---|---|---|
| "to invoke protective social services" | Georgia | Protective service agency, if none, to police |
| | Idaho | Department of Public Assistance |
| | Maine | State Department of Welfare and County Attorney |
| | Rhode Island | Dept. of Social Welfare |
| | Tennessee | Juvenile Court |
| | New Mexico | District Attorney |
| | Colorado | Law Enforcement Agency |
| | Utah | Law Enforcement Agency or State Dept. of Welfare |
| "to cause the protective services of the State —to protect the health and welfare —prevent further abuse" | Florida | Juvenile Court |
| | New Hampshire | Bureau of Child Welfare |
| | Vermont | Department of Social Welfare |
| | Indiana | County Dept. of Welfare or law enforcement |
| | Kentucky | Oral to police, written to State Child Welfare |
| | Arkansas | Police Authority |
| | Washington | Law Enforcement Agency |
| "to provide for protection of children —who may be further threatened by the conduct of those responsible for their care" | Iowa | County Department of Welfare and County Attorney, Police in emergency |
| | Delaware | Family Court |
| | Kansas | Juvenile Court |
| | Oklahoma | Public child protective agency, public welfare official, sheriff, County Attorney, police |
| | Minnesota | Police authority and County Welfare Department |
| | Montana | County Attorney |
| | New Jersey | County Prosecutor |
| | West Virginia | Prosecuting Attorney |
| | Nevada | Police or Sheriff |

Purpose clauses are found in the statutes cited note 5 *supra*. Agencies to which the reports are made are designated in the following statutes: ARK. STAT. ANN. § 42-801 (Supp. 1965); COLO. REV. STAT. § 22-13-3(3)(a) (1963); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); FLA. STAT. ANN. § 828.041(2) (Supp. 1965); GA. CODE ANN. § 74-111(b) (Supp. 1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); IND. ANN. STAT. § 52-1419 (Supp. 1966); IOWA CODE ANN. § 235A.4 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-717 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); ME. REV. STAT. ANN. tit. 22, § 3852 (Supp. 1966); MINN. STAT. ANN. § 626.554(2) (Supp. 1966); MONT. REV. CODES ANN. § 10-902 (Supp. 1965); NEV. REV. STAT. § 200.502(1) (1965); N.H. REV. STAT. ANN. § 571:27 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.3 (Supp. 1966); N.M. STAT. ANN. § 13-9-13 (Supp. 1965); OKLA. STAT. ANN. tit. 21, § 846 (Supp. 1966); R.I. GEN. LAWS ANN. § 40-13.1-3(1) (Supp. 1965); UTAH CODE ANN. § 55-16-3 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.030 (Supp. 1966); W. VA. CODE ANN. § 4904(80b) (Supp. 1965).

eight states the purpose of the reporting statute was defined as "invoking protective social services." Five states, Georgia, Idaho, Maine, Rhode Island, and Tennessee, implement procedures toward that goal by designating an appropriate agency to carry out the intent. Named by these states were the state or county department of welfare or the family or juvenile court. One of the eight states, New Mexico, negates the declared objective by designating that reports be made to the District Attorney.

Colorado and Utah compromise the question. Colorado requires reports to the proper law enforcement agency (police or sheriff), but it uses law enforcement simply as a means for transmitting the report immediately to the county department of welfare which is mandated to investigate and offer social services. Utah's compromise is in terms of giving a choice to the reporter who may report "to the city police or county sheriff or office of the Utah State Welfare Department."

In Arkansas, Florida, Indiana, Kentucky, New Hampshire, Vermont, and Washington, the purpose is given as "causing thereby the protective services of the state to be brought to bear to protect the health and welfare of such children and prevent further abuse." Of these, the implementation of Florida, New Hampshire, and Vermont remains consistent with the stated intent. Florida requires the juvenile court to be notified; New Hampshire requires reports to be made to the Bureau of Child Welfare; and Vermont directs the reports to the Department of Public Welfare. Arkansas and Washington require that the report go to an agency whose function is not consonant with the stated objective — Arkansas directs report to "an appropriate police authority" and Washington designates the recipient as a law enforcement agency.

Indiana straddles the issue by requiring that reports go to the county department of welfare or "to the law enforcement agency having jurisdiction."

Kentucky requires an immediate oral report to an appropriate police authority, to be followed as soon thereafter as possible, by a written report (to police) with a copy to the Department of Child Welfare for investigation. Construing this language in the light of the stated purpose it would seem that major service is contemplated from the Department of Welfare, with the police acting on the oral report in cases of emergency.

The remaining nine of the twenty-four states with a purpose clause express an intent to provide for the protection of children who have had injury and who may be further threatened by the conduct of those responsible for their care and protection.

Protection in the protective social services context, is provided for by Delaware and Kansas which designate the family court and juvenile court respectively, as the agencies to receive reports of abuse. Iowa's law directs reports to the county department of social welfare, thus putting in motion the protective social services. However, where the reporting source believes immediate protection is needed it shall also report to an appropriate law enforcement agency for emergency action. Iowa also provides that if the reporting source is other than a health resource (*e.g.*, doctor or hospital) the report may be directed to any county department of social welfare, a county attorney, or a law enforcement agency; but the receiving agency, if other than a county department of social welfare, must promptly refer the report to the county department of social welfare.

Minnesota directs reports to both the appropriate police authority and the county department of welfare; but the police are directed to immediately notify the county department of welfare upon receipt of a report. This would seem to emphasize exploration and service by the child welfare program, a supposition fully supported by the legislative mandate to the county department of welfare.

Oklahoma seems to incorporate a priority system. The law states that reports shall be made to a public child protective agency, to a public welfare official having responsibility for the enforcement of laws for the protection of children, to a sheriff, the county attorney, or to the police. If the order in which the various agencies are name is indicative of a priority preference, then the protective intent will be carried out in accordance with the priority designation.

Nevada directs reports to any police department or sheriff's office.

Montana, New Jersey and West Virginia round out the total of states with declared intent. These states direct reports to the county prosecutor, thereby involving an assessment of the facts with a view toward possible prosecution of the offenders.

2. Pattern in Statutes without a Purpose Clause

Table Number Seven shows the reporting pattern in the twenty-

three states without a purpose clause.[33] Analysis of the procedural pattern employed to implement the law furnishes clues to the intended objective of the law.

[33] TABLE NUMBER 7:

| Implied Purpose | State | Report to: |
|---|---|---|
| To invoke protective social services | Alaska | Dept. of Welfare, if none, police |
| | Illinois | State Department of Welfare |
| | Massachusetts | State Department of Welfare |
| | North Dakota | Director, Division of Child Welfare —Emergency to Juvenile Commissioner or State Attorney |
| | New York | SPCC or Dept. of Public Welfare |
| | North Carolina | County Director of Welfare |
| | Wyoming | County Dept. of Welfare |
| | Pennsylvania | Judge, Juvenile Court or Child Protective Service |
| | South Carolina | Juvenile Court (proper authority with jurisdiction over minors) |
| | South Dakota | Judge of the County Court |
| | Ohio | Municipal or county peace officer |
| | Wisconsin | County Dept. of Welfare or Sheriff |
| May invoke protective social services, if reporter chooses, or law enforcement | Alabama | Police, sheriff or nearest child protective agency |
| | Connecticut | Commissioner of Health, Commissioner of Welfare, local police, state police |
| | Michigan | Prosecuting Attorney, County Dept. of Welfare, state officer of State Dept. of Welfare |
| | Texas | Juvenile Court, County Attorney, law enforcement, county probation officer |
| Invoke law enforcement machinery | Arizona | Municipal or county peace officer |
| | California | Head of police, sheriff or District Attorney |
| | Louisiana | Municipal police or nearest law enforcement agency |
| | Maryland | Appropriate law enforcement agency |
| | Missouri | Appropriate law enforcement agency |
| | Nebraska | County Attorney |
| | Oregon | Medical Investigator |
| | Tennessee | Judge having juvenile jurisdiction in county where child resides |

The following statutes indicate to whom the reports should be directed: ALA. CODE tit. 27, § 21 (Supp. 1965); ALASKA STAT. § 11.67.020 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01A (Supp. 1966); CAL. PEN. CODE § 11161.5 (West Supp.); CONN. GEN. STAT. ANN. § 17-38a(b) (Supp. 1965); ILL. ANN. STAT. ch. 23, §§ 2043, 2047 (Smith-Hurd Supp. 1966); LA. REV. STAT. ANN. § 14:403B (West Supp. 1965); MD. ANN. CODE art. 27, § 11A(d) (Supp. 1965); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(2) (Supp. 1965); MO. ANN. STAT. § 210.105(2) (Supp. 1966); Neb. Sess. Laws 1965, ch. 206, § 1; N.Y. PEN. LAW § 483-d(1); N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-01 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); ORE. REV. STAT. § 146.750 (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); S.C. CODE ANN. § 20-302.1 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 2. TENN. CODE ANN. § 37-1202 (Supp. 1966). TEX. REV. CIV. STAT. ANN. art. 695c-2(1) (Supp. 1966); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. § 14-28.2 (1965).

Twelve of these twenty-three states obviously designed the law to invoke the protective social services of the community on behalf of abused children. The key to this conclusion is their choice of social service agencies to receive reports of abuse.

Alaska, Massachusetts and North Dakota designated the state department of welfare as recipient of the report. All but Massachusetts provided an alternative action to meet emergencies. Alaska provides that if no office of the department is available the report may go to the nearest local law enforcement agency,[34] but the department must be advised of this additional report. North Dakota directs that, if immediate action is warranted, the report may go to the juvenile court or to a juvenile commissioner.

North Carolina and Wyoming law request that the report be made to the county department of welfare. New York directs reporting to the Society for the Prevention of Cruelty to Children, or other duly authorized child protective agency, or to the (county) department of welfare. New York's position is interesting in that although the law is placed in the penal code, the purpose of the law seems nonpunitive because the report goes to the protective social services in the community. Pennsylvania is in a similar situation, with reporting requirements located in the penal code, but the juvenile court receives reports of abuse.

Ohio and Wisconsin fall into a special category. Ohio law directs reports to municipal or county peace officers. However, upon receipt of the report that officer must refer it to an appropriate county department of welfare which is then mandated to investigate and provide social services to protect the child and preserve the family. This is almost identical to the Colorado law.

In Wisconsin, while the county child welfare agency or the sheriff may receive the reports, the county child welfare agency will always be involved because the recipient of the report must notify the other within forty-eight hours. The sheriff may also refer to the district attorney if he feels legal action is necessary. In any case, the child welfare agency is directed to act in accordance with its powers and duties, thereby seemingly assuring a protective social service to child and family.

South Dakota directs that the report be made to the juvenile court.[35] South Carolina is not very specific. The law orders reports be made to the proper county authority having jurisdiction over minors or to the sheriff. Subject to local interpretation, it would seem that the juvenile court would fit best the description of "proper county authority with the jurisdiction over minors."

---

[34] ALASKA STAT. § 11.67.020(a) (Supp. 1966).

[35] S.D. Sess. Laws 1964, ch. 90, § 2.

Four of the remaining eleven states permit reporting to protective social services or to law enforcement agencies. The choice seems to be left to the person making the report, unless the order in which the agencies are named may be deemed to be indicative of priority. Alabama permits reporting to the police or sheriff or to the nearest child welfare agency with child protective services. Connecticut asks that the report go to the State Commissioner of Health, the State Welfare Commissioner, to the local police department or to the resident state policeman. Michigan directs the report in quadruplicate with one copy to the prosecuting attorney, one copy to the county department of welfare, one copy to the Lansing office of the State Department of Welfare and one copy to the Probate Court. Texas lists the receiving agencies as the juvenile court judge, the district attorney, the county attorney, local law enforcement agency, or the county probation officer.

The remaining states in this group direct reports to law enforcement authorities, although different resources are named. Arizona names municipal or county peace officers. California asks for reports to the head of the police department, sheriff, or district attorney; Louisiana to the municipal police department or the nearest law enforcement agency; Maryland to the appropriate law enforcement agency; Missouri to an appropriate law enforcement agency; and Nebraska to the county attorney. Oregon stands alone in directing reports to the medical investigator. These seven states patently regard reports of child abuse as matters requiring police investigation, implying a policy of arrest and prosecution where the facts are substantiated by the investigation.

Where the reporting source has an option to choose which agency it reports to, the probability exists that the ultimate community action taken on the report will vary with the agency chosen. This seeming flexibility of action may be the result of a deliberate decision by the legislature to give an option to the reporting source. On the other hand, it may be the result of indecision on the part of legislature — a lack of conviction about which is the better action — or, more likely, it may represent a compromise of conflicting views. A third possibility is that the legislature wished to provide alternative courses of action in the event that the first choices were not available in a given community.

F. *Responsibility of Agency Receiving Report*

As discussed earlier, the effectiveness of reporting laws in accomplishing the intended objective rests on the agency chosen to

receive the report because these agencies operate within defined functional areas. Thus, what the agency does about the report, how quickly it acts and how responsibly it provides service, will determine the adequacy and degree of protection which the community makes available to abused children.

It would seem helpful, however, if in addition to making the proper choice, the legislature were to provide direction or guideline to indicate what is expected and to impose responsibility upon the agency charged with receiving the report. To a degree, the purpose clause with its expression of intent and goals provides a blueprint for action. However, twenty-four of the twenty-seven statutes carry more explicit directions which mandate particular action or permit options for discretionary action by the agency receiving the report.

An interesting study in this connection relates to a breakdown of the forty-seven states in accordance with the presence or absence of a purpose clause and/or a mandate to the receiving agency. While the number of states which have purpose clauses (23) and mandates (25) to the receiving agency is approximately the same, the two groups are not identical. Table Number Eight identifies the states in relation to purpose clause and legislative mandate.[36]

[36] TABLE NUMBER 8:

| Category | States |
|---|---|
| I. Purpose clause and legislative mandate | Colorado, Delaware, Indiana, Iowa, Kentucky, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, Tennessee, Washington, West Virginia |
| II. Purpose clause but no legislative mandate | Arkansas, Florida, Georgia, Idaho, Kansas, Maine, Oklahoma, Utah, Vermont |
| III. Legislative mandate but no purpose clause | Alaska, Illinois, Maryland, Massachusetts, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Wisconsin, Wyoming |
| IV. No purpose clause, no legislative mandate | Alabama, Arizona, California, Connecticut, Louisiana, Missouri, New York, Pennsylvania, South Carolina, South Dakota, Texas |

Legislative mandates are listed in the following statutes (statutes with purpose clause in note 5, *supra*): ALASKA STAT. § 11.67.040 (Supp. 1966); COLO. REV. STAT. § 22-13-4 (1963); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); ILL. ANN. STAT. ch. 23, § 2047 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1422 (Supp. 1966); IOWA CODE ANN. § 235A.5 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); MD. ANN. CODE art. 27, § 11A (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39B (Supp. 1966); MINN. STAT. ANN. § 626.554(4) (Supp. 1966); MONT. REV. CODES ANN. § 10-903 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 3; NEV. REV. STAT. § 200.504 (1965); N.H. REV. STAT. ANN. § 571:25 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.5 (Supp. 1966); N.M. STAT. ANN. § 13-9-14 (Supp. 1965); N.C. GEN. STAT. § 14-318.3 (Supp. 1965); N.D. CENT. CODE § 50-25-03 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); ORE. REV. STAT. § 146.740 (1965); R.I. GEN. LAWS ANN. § 40-13.1-4 (Supp. 1965); TENN. CODE ANN. § 37-1204 (Supp. 1966); WASH. REV. CODE ANN. § 26.44.050 (Supp. 1966); W. VA. CODE ANN. § 4904(80c) (Supp. 1965); WIS. STAT. ANN. § 48.981(1) (Supp. 1966); WYO. STAT. ANN. §§ 14-21, 14-28.3 (1965).

The importance and value of legislative language defining the responsibility of the agency receiving reports of child abuse is vividly emphasized by the examples cited below. Minnesota's law contains a concise statement of responsibility: "The county welfare agency shall investigate complaints of neglect and abuse of children and offer protective social services in an effort to protect the health and welfare of these children and to prevent further abuses."[37] Other statements range from Kentucky's two-word mandate, "[to the Department of Child Welfare] . . . for investigation,"[38] to the minutely detailed instruction found in Iowa.[39]

Between these extremes is the language in the Colorado law adopted in whole or in part by Illinois, Nevada, Ohio and Rhode Island. In those states the law defines the duties and imposes limitations on the receiving agencies. For the police department (or sheriff), Colorado law states that upon receipt of a report "it shall be the duty of the law enforcement agency to refer such report to the department [county department of welfare]."[40] The limitation is equally clear. "No child upon whom a report is made shall be removed from his parents . . . by a law enforcement agency without consultation with the department unless, in the judgement of the reporting physician and the law enforcement agency, immediate removal is considered essential to protect the child from further injury or abuse."[41]

This limitation recognizes the importance of a decision to remove a child from his home. Such a step is not only a major infringement of parental rights, but also, it may have long lasting and damaging effects on the child. Removal must be predicated on a clearcut evaluation of imperative need and the child's best interests. Consultation with the department provides a basis for this evaluation with the opinion of the department or the physician supporting the action of the police.

The Colorado law then defines the duties of the department. The department shall: (1) investigate to determine the cause of the injury and who was responsible; (2) provide social services to protect the child and preserve the family; (3) advise the law enforcement agency of its investigation; (4) if further action is necessary, (a) refer the case to the district attorney for prosecution or (b) file a petition of neglect in the juvenile court.[42]

---

[37] MINN. STAT. ANN. § 626.554(4) (Supp. 1966).

[38] KY. REV. STAT. ANN. § 199.335 (Supp. 1966).

[39] IOWA CODE ANN. § 235A.5 (Supp. 1965).

[40] COLO. REV. STAT. § 22-13-4(1) (1963).

[41] COLO. REV. STAT. § 22-13-4(2) (1963).

[42] COLO. REV. STAT. § 22-13-5 (1963).

North Dakota introduces an important concept — the need to protect siblings of the abused child and the need for social services to the parents: "The division of child welfare and the county welfare board shall provide protective services for the injured or neglected child and his siblings as may be necessary for their well-being, and shall offer such other social services, as the circumstances warrant, to the parents. . . ."[43]

Montana, Nebraska, New Mexico, New Jersey, and West Virginia, which require that reporting be directed to the county prosecutor, define the duties of that official upon receipt of the report. The language is substantially of two types — one, as in West Virginia, relates to prosecution; the other, as in New Mexico, permits referral for social services. The New Mexico law reads: "The district attorney . . . shall investigate the report immediately to determine who caused the reported injury or abuse. If it is found that a parent . . . inflicted the injury or abused the child, the district attorney immediately shall take such action as may be necessary to prevent further injury. . . . The district attorney shall also, whenever he deems it appropriate, notify the local office of the department of public welfare . . . for investigation and report or other appropriate action. . . ."[44] West Virginia provides: "The prosecuting attorney . . . shall forthwith investigate, or cause to be investigated . . . to determine the cause of such injury and determine the person or persons responsible, if any. If it is found that any person wilfully inflicted such injury or abuse on such child, the prosecuting attorney shall immediately take . . . such action as may be necessary to prevent any further injury or abuse . . . and to punish the person . . . responsible. . . ."[45]

### G. *Immunity under the Law*

The granting of immunity against criminal or civil action to persons reporting under the act is an important element of the law. Freedom from fear of retaliation by angry parents is considered necessary to promote reporting. The medical profession, a special target group of the law, felt itself particularly vulnerable to lawsuits without such protection. All forty-seven statutes provide some form of immunity. While the language varies, the import is the same — to provide a defense against civil or criminal actions based

[43] N.D. CENT. CODE § 50-25-03 (Supp. 1965).

[44] N.M. STAT. ANN. § 13-9-14 (Supp. 1965).

[45] W. VA. CODE ANN. § 4904(80c) (Supp. 1965).

on the making of the report. Table Number Nine shows the classification of states by the type of immunity provided.[46]

Typical language is: Any person participating in good faith in the making of a report pursuant to this act or participating in a judicial proceeding resulting therefrom shall in so doing be immune from any liability, civil or criminal, that might otherwise be incurred or imposed. The inclusion of the concept of "good faith," which was done in thirty-five states, is important because the law would be inequitable if it were to provide absolute protection in the face of a malicious intent to injure the party against whom a report is made. Some states establish a "good faith" standard although in other wording. For example, Kansas provides, "without malice"; Maine applies the phrase "unless done in bad faith or with malicious purposes"; North Carolina provides, "unless such person acted in bad faith or with malicious purpose."

[46] TABLE NUMBER 9:

| | |
|---|---|
| Immunity Granted if in Good Faith | Alaska, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Vermont, Wisconsin, Wyoming |
| Immunity Granted Presumption of Good Faith | Arkansas, Florida, Illinois, Montana, New Mexico, South Carolina, Tennessee, West Virginia |
| Immunity Granted No Mention of Good Faith | Alabama, Arizona, California, Colorado, Idaho, Maryland, Nebraska, New Jersey, Ohio, Pennsylvania, Texas, Washington |

Immunity provisions are contained in the following statutes: ALA. CODE tit. 27, § 23 (Supp. 1965); ALASKA STAT. § 11.67.050 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01(c) (Supp. 1966); ARK. STAT. ANN. § 42-804 (Supp. 1965); CAL. PEN. CODE § 11161.5 (West Supp.); COLO. REV. STAT. § 22-13-6 (1963); CONN. GEN. STAT. ANN. § 17-38a(c) (Supp. 1965); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); FLA. STAT. ANN. § 828.041(4) (1965); GA. CODE ANN. § 74-111(c) (Supp. 1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); ILL. ANN. STAT. ch. 23, § 2045 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1423 (Supp. 1966); IOWA CODE ANN. § 235A.7 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-718 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); LA. REV. STAT. ANN. § 14:403C (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3854 (1966); MD. ANN. CODE art. 26, § 11A(g) (Supp. 1966); MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966); MICH. STAT. ANN. § 14.564(3) (Supp. 1966); MINN. STAT. ANN. § 626.554(5) (Supp. 1966); MO. ANN. STAT. § 210.105(3) (Supp. 1966); MONT. REV. CODES ANN. § 10-904 (Supp. 1965); Neb. Sess. Laws 1965, ch. 206, § 2; NEV. REV. STAT. § 200.505 (1965); N.H. REV. STAT. ANN. § 571:28 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.6 (Supp. 1966); N.M. STAT. ANN. § 13-9-15 (Supp. 1965); N.Y. PEN. LAW § 483-d(2); N.C. GEN. STAT. § 14-318.2 (Supp. 1965); N.D. CENT. CODE § 50-25-04 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 847 (Supp. 1966); ORE. REV. STAT. § 146.760 (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); R.I. GEN. LAWS ANN. § 40-13.1-6 (Supp. 1965); S.C. CODE ANN. § 20-302.3 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 3; TENN. CODE ANN. § 37-1206 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 695c-2(3) (Supp. 1966); UTAH CODE ANN. § 55-16-4 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1354 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.060 (Supp. 1966); W. VA. CODE ANN. § 4904 (80d) (Supp. 1965); WIS. STAT. ANN. § 48.981(2) (Supp. 1966); WYO. STAT. ANN. § 14-28.4 (1965).

Eight of the thirty-five states establish a presumption of good faith in regard to the report: "Every report made pursuant to this act shall be presumed to have been made in good faith." Out of these eight, only Illinois identifies the presumption of good faith as a rebuttable one by the use of the term — "prima-facie." Whether the other seven are also subject to rebuttal is not clear, and as yet untested.

It would seem that the twelve states which do not qualify immunity by the test of good faith provide uncontestable immunity. This question has also not yet been tested by litigation.

Other differences in the nature of immunity exist. Four states — Idaho, Maryland, Massachusetts, and Nebraska — seem to provide immunity only in civil cases. Idaho says, "immunity from civil liability . . ."[47] and Maryland provides, "immune from any civil liability. . . ."[48] The Massachusetts language is ambiguous; "any information contained in such report . . . shall not constitute slander or libel."[49] Nebraska's statute is equally unclear; "the information contained in any report . . . shall be absolutely privileged and shall not constitute slander, libel, breach of confidence, or invasion of any right of privacy."[50] Whether the latter two are limited to civil actions is uncertain.

Wisconsin stands alone as being the only state to provide immunity solely from criminal liability.

H. *Penalty under the Law*

The penalty clause is a provision which makes it a misdemeanor for a person to willfully violate provisions of the act. In this instance, the duty is the obligation to report, if in possession of information which tends to indicate that the child was injured by other than accidental means, or injured in the specific manner described by the state reporting law. The clause is a device for enforcing the law.

Opinions differ regarding the value of a penalty clause in a law of this nature. The chief argument against the penalty clause is the fact that failure to report must be willful. It is difficult, if not impossible, to establish willful intent in a failure to report because of the fact that suspicions about the cause of a child's injury are uniquely subjective and not provable by objective standards. These injuries are vastly different from a clearly identifiable gunshot wound or stab wound, the frequent subjects of other mandatory

---

[47] IDAHO CODE ANN. § 16-1641 (Supp. 1965).

[48] MD. ANN. CODE art. 27, § 11A(g) (Supp. 1966).

[49] MASS. GEN. LAWS ANN. ch. 119, § 39A (Supp. 1966).

[50] Neb. Sess. Laws 1965, ch. 206, § 2.

reporting legislation. Since suspicion that given injuries were inflicted rather than accidental is a weighted, subjective diagnosis, prosecution for failure to report would be confronted with insurmountable problems of proof, which may render the penalty clause ineffective.

Lack of agreement on the merits of the clause was reflected in the fact that the forty-seven states were evenly divided on the point. Twenty-four incorporated a penalty clause into the law, and twenty-three omitted that provision. As might be expected, six of the twenty-four without penalties are the states which made their reporting laws permissive rather than mandatory. Table Number Ten lists the states with, or without, a penalty clause.[51]

Differences exist in the language used and the penalties prescribed by the twenty-four laws. Substantially, the wording reads, "Anyone knowingly and willfully violating the provisions of this act shall be guilty of a misdemeanor." The severity of penalties ranges from Vermont's low of a fine of not more than $25.00, to Pennsylvania's high of one year in jail, a $500.00 fine, or both.

## I. *Waiver of Privilige*

Because the medical profession expressed concern over the propriety of divulging confidential matter disclosed to them in the doctor-patient relationship, the reporting act provides a waiver of that privilege. By such waiver, a doctor is freed from legal or ethical restrictions against revealing confidential information.

A similar privilege exists between husband and wife. Neither may divulge information damaging to the other in any criminal

[51] TABLE NUMBER 10:

| | |
|---|---|
| With Penalty Clause | Alabama, Arizona, Arkansas, Delaware, Florida, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, Wyoming |
| Without Penalty Clause | Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Maryland, Massachusetts, Missouri, Montana, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Washington, West Virginia |

Statutes from those states with a penalty clause are found in the following statutes: ALA. CODE tit. 27, § 25 (Supp. 1965); ARIZ. REV. STAT. ANN. § 13-842.01(D) (Supp. 1966); ARK. STAT. ANN. § 42-806 (Supp. 1965); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); FLA. STAT. ANN. § 828.041(6) (1965); KAN. GEN. STAT. ANN. § 38-720 (Supp. 1965); KY. REV. STAT. ANN. § 199.335(6) (Supp. 1966); LA. REV. STAT. ANN. § 14.403E (West Supp. 1965); ME. REV. STAT. ANN. tit. 22, § 3855 (Supp. 1966); MICH. STAT. ANN. § 14.564(5) (Supp. 1965); MINN. STAT. ANN. § 626.554(7) (Supp. 1966); Neb. Sess. Laws 1965, ch. 206, § 4; NEV. REV. STAT. § 200.507 (1965); N.H. REV. STAT. ANN. § 571:30 (Supp. 1965); N.J. STAT. ANN. § 9:6-8.7 (Supp. 1966); ORE. REV. STAT. § 146.990 (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); S.C. CODE ANN. § 20-302.4 (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 5; TENN. CODE ANN. § 37-1203 (Supp. 1966); UTAH CODE ANN. § 55-16-6 (Supp. 1965); VT. STAT. ANN. tit. 13, § 1355 (Supp. 1965); WIS. STAT. ANN. § 48.981(3) (Supp. 1966); WYO. STAT. ANN. § 14-28.6 (1965).

proceedings without a release from the spouse against whom the evidence is being given. Since, in child abuse cases the only witnesses to the abuse may be the parents themselves, some reporting laws make the husband-wife privilege inapplicable.

Not all states waived these privileges and the pattern is irregular. Table Number Eleven shows a breakdown of the forty-seven states in terms of the type of privilege waiver found in the law.[52] Fourteen states provide waiver of both privileges. Five states waive the doctor-patient privilege "or similar privilege or rule against disclosure." It may be argued that this clause ("or similar privilege . . .") can be construed to include the husband-wife privilege. However, if more strictly interpreted, the phrase may apply only to similar medical privilege, *i.e.,* nurse-patient, or hospital-patient.

Twelve states used a waiver for the doctor-patient privilege only. Idaho only waived the husband-wife privilege. The balance of fifteen states provided neither waiver.

---

[52] TABLE NUMBER 11:

| Type of Privilege | State |
|---|---|
| Doctor- patient and Husband-wife | Alabama, Alaska, Arkansas, Delaware, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, North Dakota, Oregon, South Dakota |
| Doctor- patient "or similar" | Kansas, Montana, Nevada, New Mexico, Oklahoma |
| Doctor-patient only | Arizona, Colorado, Florida, Illinois, Nebraska, North Carolina, Ohio, Pennsylvania, Utah, Washington, Wyoming |
| Husband-wife only | Idaho |
| No waiver of Privilege | California, Connecticut, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, Wisconsin |

The following statutes provide for waiver of privileges: ALA. CODE tit. 27, § 24 (Supp. 1965); ALASKA STAT. § 11.67.060 (Supp. 1966); ARIZ. REV. STAT. ANN. § 13-842.01(C) (Supp. 1966); ARK. STAT. ANN. § 42-805 (Supp. 1965); COLO. REV. STAT. § 22-13-7 (1963); DEL. CODE ANN. tit. 16, § 1003 (Supp. 1966); FLA. STAT. ANN. § 828.041(5) (1965); IDAHO CODE ANN. § 16-1641 (Supp. 1965); ILL. ANN. STAT. ch. 23, § 2046 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 52-1425 (Supp. 1966); IOWA CODE ANN. § 235A.8 (Supp. 1965); KAN. GEN. STAT. ANN. § 38-719 (Supp. 1965); KY. REV. STAT. ANN. § 199.335(5) (Supp. 1966); LA. REV. STAT. ANN. § 14:403D (West Supp. 1965); MICH. STAT. ANN. § 14.564(4) (Supp. 1965); MINN. STAT. ANN. § 626.554(6) (Supp. 1966); MO. ANN. STAT. § 210.105(4) (Supp. 1966); MONT. REV. CODES ANN. § 10-905 (Supp. 1965); NEB. REV. STAT. § 25-1207 (1963); NEV. REV. STAT. § 200.506 (1965); N.H. REV. STAT. ANN. § 571:29 (Supp. 1965); N.M. STAT. ANN. § 13-9-16 (Supp. 1965); N.D. CENT. CODE § 50-25-05 (Supp. 1965); OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966); OKLA. STAT. ANN. tit. 21, § 848 (Supp. 1966); ORE. REV. STAT. § 146.770 (1965); PA. STAT. ANN. tit. 18, § 4330(b) (Supp. 1965); S.D. Sess. Laws 1964, ch. 90, § 4; UTAH CODE ANN. § 55-16-5 (Supp. 1965); WASH. REV. CODE ANN. § 26.44.060 (Supp. 1966); WYO. STAT. ANN. § 14-28.5 (1965).

## J. *Special Provisions*

### 1. Religious Healing

Special provisions are present in some statutes which have serious implication. Of special significance is an exception to the reporting law in the statutes of Alabama, Minnesota, and Ohio. Each of these states defines the reportable injury as one which appears to have been caused by abuse or neglect. Use of the word "neglect" gives rise to the special provisions. Their purpose is to exclude from a possible definition of neglect the child who is under "spiritual" treatment.

The intent and purpose of the exception is stated clearly in the Minnesota statute: "Provided, however, that no provision of this section shall be construed to mean that a child is neglected or lacks proper parental care solely because said child's parent, guardian, or custodian in good faith selects and depends upon spiritual means or prayer for the treatment or cure of disease or remedial care of such child."[53] Alabama's clause reads: "provided, however, that a child who is being furnished Christian Science treatment by a duly accredited Christian Science practitioner shall not be considered a physically neglected child for the purposes of this section."[54] The Ohio law states, "Nothing in this section shall be construed to define as a physically neglected child, any child who is under spiritual treatment through prayer in accordance with the tenants and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child."[55]

Both Alabama and Ohio inject an element not found in the Minnesota language. This factor is the requirement that the spiritual treatment be under a duly accredited religious practitioner (Alabama) or in accord with the tenants of a well-recognized religion (Ohio). This provision seems important to rule out the fraud or the quack-healer, and also the parent whose reliance on prayer may be a manifestation of emotional illness rather than adherence to religious conviction.

The author has grave reservations about these exclusions. In twenty-five years of practice in the child protective field, numerous cases were found in which a child's life was endangered by parental refusal to permit needed emergency surgery or a blood transfusion. Where parental objection is based on religious grounds, a neglect petition in the juvenile court seeking a court order to permit necessary medical treatment becomes the only recourse open to the com-

---

[53] MINN. STAT. ANN. § 626.554(2) (Supp. 1966).

[54] ALA. CODE tit. 27, § 21 (Supp. 1965).

[55] OHIO REV. CODE ANN. § 2151.42.1 (Page Supp. 1966).

munity for safeguarding the child's life. In many of these cases, after court orders were obtained, parents expressed relief at being freed of the onus to resolve the conflict between the prohibitions of their religious tenants and a genuine concern, and despair, for the child's life.

The language employed in these special clauses result in preventing the reporting and identification of the child. What is more important, however, is the possibility that the exclusion of these children from being considered neglected may also create a bar to the filing of a petition in juvenile court should it become necessary to obtain a court order to save a child's life.

2. Central Registry

Another clause in some reporting laws deals with the creation of a central registry for child abuse cases. California amended its reporting law in 1965 to add a section requiring a central registry. Responsibility for this record keeping is given to the State Bureau of Criminal Identification and Investigation. The records will consist of all reports of "suspected infliction of physical injury upon a minor by other than accidental means . . . and reports of arrests for, and convictions of, violations of Section 273a . . . ."[56] The Bureau is charged with an obligation to, "transmit to the city police department, sheriff or district attorney information detailing all previous reports of suspected infliction of physical injury upon the same minor or another minor in the same family by other than accidental means and reports of arrests for, and convictions of violation of Section 273a, concerning the same minor or another minor in the same family."[57] Information for the registry is forwarded to the bureau by the head of a city police department, sheriff, or district attorney, all of whom are designated to receive reports in the reporting law. The section goes on to say that the information sent by the Bureau to police, sheriff, and district attorney is to be made available as follows: "Reports and other pertinent information received from the bureau [by police, sheriff or district attorney] shall be made available to any licensed physician and surgeon, dentist, resident, intern, chiropractor, religious practitioner . . . or probation department and to any agency offering child protective services."[58]

The value of a central registry is self-evident. But the advisability of a registry under the auspices of a Bureau of Criminal Identification is subject to question in child abuse cases, since use of the registry is primarily intended for purposes of diagnosis. Knowledge

---

[56] CAL. PEN. CODE § 11110 (West Supp.).

[57] *Ibid.*

[58] CAL. PEN. CODE § 11161.5 (West. Supp.).

of prior experience with the same family will weigh the scales in terms of suspecting possible abuse in situations where the diagnosis cannot be readily made. A registry will also reveal any shopping around for medical services in cases of repeated injuries to the same child or to other children in the same family.

To place the registry in a police-oriented setting serves only to stress punitive ends and criminal identification. Many local communities have set up central registries, but under auspices of welfare departments or health departments — a framework fulfilling the intended use of the registry as an aid in diagnosis, medical treatment, and services to children and families. The Illinois reporting law also has a provision for a central registry, but responsibility for the registry is placed with the State Department of Welfare.

3. Appropriations

A special clause in the Illinois law is an example of sound legislative planning and genuine understanding of special needs created by new obligations under new law. The reporting law mandates the Illinois Department of Children and Family Services to investigate reports of child abuse and to offer protective social services. The department is also directed to set up a central registry of all reported cases. Recognizing that these obligations add a new and heavy burden to the department, the legislature made a special appropriation of $50,000 to the department's budget to permit expansion of the program to meet the added responsibility.

A parallel occurrence took place in Michigan. The reporting law was enacted in 1964. In 1965, the legislature authorized the State Department of Social Welfare to initiate a Child Protective social service program to fill a long-term need brought into clearer focus by the 1964 reporting act. With the authorization, the legislature made an appropriation of $50,000 to the Department to match Federal Child Welfare funds, the total sum to be used for creation and expansion of the new program.

## CONCLUSION

The rush by states to press through legislation seeking reports of child abuse cases attests to wide recognition of the problem and of the dangers to its victims. That forty-seven laws were enacted in the short span of three years bears witness to general acceptance of the urgent necessity to do something on behalf of abused children.

To think that these laws will end the child abuse problem is naive and unrealistic. This legislation is only a beginning. It is solely a tool for discovering and identifying the child who is abused. The states which have enacted reporting legislation have taken no more

than the first step in the process to involve the full compliment of services necessary to treat the problem, protect the child, and preserve the family. Unless this fact is understood fully, and accepted completely, there is danger that communities with reporting laws will become complacent under the mistaken notion that there need be no further concern about child abuse and neglect.

One area which requires immediate attention is the child protective services. These services are essential to the investigation, diagnosis, and treatment of abused children and their parents. This specialized child welfare service however, is not universally available. A 1955 study revealed many serious local and statewide gaps in the availability of child protective services.[59] A current study is showing a more widespread extension of child protective services, but large gaps still remain. An encouraging development seen by the new survey, is the definite pressure for expansion of these programs to cover all communities in every state.

The lack of or inadequacy of present child protective services is usually due to one of the following reasons: (1) the local or state child welfare program lacks a clear legal base for providing child protective services; (2) the legal base is permissive, rather than mandatory, and the appropriating body has failed to allocate funds; (3) there is a legal base and a child protective program has been initiated, but funds are insufficient to expand services to meet more than a minimal part of the community needs. The obvious conclusion is that legislative action is necesary to authorize and maintain child protective services or to appropriate necessary and sufficient funds if these protective social services are to meet the needs of abused and neglected children.

Two states have taken this next step as a direct outgrowth of reporting legislation. The Illinois and Michigan legislatures have demonstrated the importance of better services by providing adequate funds.

In the 1962 amendments to the Social Security Act, Congress required provision of child protective services by the new definition of Public Child Welfare Services. Without equivocation, the definition clearly requires that child protective services be part of all public child welfare programs. However, at the same time, congressional appropriations did not keep pace with the actual need. If existing public child welfare services are to expand to include the new program, additional funds must be made available. Congress can play a leading role in providing funds to meet the needs of the child abuse problem. It must make available sufficient new child welfare funds

[59] THE AMERICAN HUMANE ASSOCIATION, CHILD PROTECTIVE SERVICES IN THE UNITED STATES (1956).

to stimulate, and underwrite, in part, the development of more adequate child protective services.

But with or without federal aid, states and communities must promote the creation or expansion of child protective services so that all neglected and abused children may be protected from parental failures and their parents helped to achieve more adequate parental roles.

# THE COLORADO ADMINISTRATIVE PROCEDURE ACT: EXCLUSIONS DEMANDING REFORM

BY HUBERT D. HENRY*

*Mr. Henry demonstrates his expertise in the area of administrative law in Colorado as he urges reform in the State Administrative Procedure Act. After discussing the development of the APA, the author points out its shortcomings by examples of agencies which are not governed by the act. The lack of uniformity and multifarious procedural differences among administrative agencies warrant consideration of the reforms posed by the revised State Administrative Procedure Act which The Colorado Legislature failed to enact in 1963. He then discusses how the revised act would resolve many of the problems not covered by the present act. Moreover he recommends that all agency material which is required by law to be published be compiled in a state register. Presently, this material may be published separately by each agency. Mr. Henry urges that the revised act be reconsidered by the legislature as soon as possible to attain procedural uniformity in administrative agencies.*

## INTRODUCTION

THE State Administrative Procedure Act of Colorado (APA) was born of necessity — or at least expediency verging on necessity. A uniform and explicit statement of the law regulating procedures of Colorado's many administrative agencies was sought by the proponents of the act. At the time of the statute's drafting in 1959, there was an increasing demand for the creation of new state agencies and for the revision of acts governing existing agencies.[1] Proponents of such legislation urged that it include greater detail concerning procedure and review. It was evident, however, that the inclusion of such details in the acts regulating individual agencies would undesirably increase the bulk of the statutes. But experience under the Federal Administrative Procedure Act had shown that many of these details could be incorporated into a single statute relating to a large number of agencies; statutes pertaining to individual agencies could thereby be shortened, and the desired uniformity achieved.

The Administrative Law Committee of the Colorado Bar Association undertook the task of writing such a statute. Its proposed

* Member Colorado Bar, Chairman, Colorado Bar Association Administrative Law Committee, 1957-63.

[1] Henry, *Bar Briefs The 1959 Session of the Colorado General Assembly*, 36 DICTA, 257, 264 (1959).

bill was presented to the Colorado General Assembly and enacted into law in 1959.[2] It was amended slightly in 1961[3] at the suggestion of the Administrative Law Committee of the Colorado Bar Association, and is now Article 16, of Chapter 3, of the Colorado Revised Statutes of 1963. The act is generally referred to as the State Administrative Procedure Act, although it is not officially designated as such by the statute.

The basic guide used by the Colorado Bar Committee in drafting this act was the 1957 final draft of the proposed federal code of administrative procedure.[4] Since its adoption in 1946,[5] the Federal Administrative Procedure Act has never been substantially amended. However, during the years subsequent to the adoption of the federal act, committees of the American Bar Association have attempted unsuccessfully to secure a major revision that would incorporate clarifications found desirable after actual experience under that act; the 1957 proposed code was the fruit of one committee's efforts.

The drafters also referred to the revised Model State Administrative Procedure Act to assist them in preparing the Colorado Statute. The Model Act was first adopted by the National Conference of Commissioners on Uniform State Laws in 1946; it was meant to parallel the federal act, but for state administrative procedure. The initial draft underwent a subsequent period of revision which culminated in the revised Model Act of 1961.[6]

The drafters of the federal act and the model state act began with the same basic propositions and ideas in mind. Although development of the acts by separate committees caused some variation in language and arrangement, their major provisions remained substantially the same. The Colorado Bar Committee drew from both acts the provisions that it felt would be desirable in administrative practice in Colorado, rejecting only those which seemed inappropriate to specific attitudes and practices which had developed through the years in the state's administrative procedure. As a result, the APA varies in language and to some extent in arrangement of content from the federal and revised model state act, but does not vary significantly in substance.

---

[2] COLO. REV. STAT. §§ 3-16-1 to -6 (1963).

[3] Colo. Sess. Laws 1961, ch. 44, at 138.

[4] The American Bar Association Code was introduced as S. 2335, 88th Cong., 2d Sess. (1964), and the Senate watered it down to S. 1663, 88th Cong., 2d Sess. (1964). See generally 1 DAVIS ADMINISTRATIVE LAW TREATISE § 1.04 (Supp. 1966).

[5] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

[6] Reprinted and criticised in DAVIS, ADMINISTRATIVE LAW, Cases—Text—PROBLEMS 575 (1965). Also criticised in 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 1.04 (Supp. 1966).

In spite of the lack of substantial amendment to the Colorado act since its enactment in 1959, the present law has not been completely satisfactory. In 1963 the Administrative Law Committee of the Colorado Bar Association presented to the General Assembly a complete revision of the law.[7] However, because of an amendment to the bill in the House of Representatives which apparently would have permitted non-lawyers to represent others[8] before administrative agencies, the Colorado Bar Association withdrew its support of the bill, and it died in the Senate.[9]

The APA does not achieve the commendable goal of uniformity sought by its proponents. One of its greatest inadequacies is the following provision: "Where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[10] This clause has left many areas of procedure where the APA is consequently inapplicable. By discussing the scope of this law and other statutory provisions applicable to agencies, major areas of conflict are discernable. At that point recommended reforms to rectify these conflicts can be discussed.

## I. THE PRESENT STATE ADMINISTRATIVE PROCEDURE ACT

The present APA in addition to the definitions section[11] and the applicability provision,[12] has the following four main parts: Rule-making, procedure: Licensing; Hearings; and Judicial review.

### A. *Rule-making*[13]

Before making a rule [regulation] an agency must hold a public rule-making proceeding.[14] At least twenty days before the hearing, the agency must give public notice, stating the time, place and nature of the proceeding, the authority under which the rule is pro-

[7] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. (1963). Although there are no official copies of unenacted bills, the Legislative Reference Office maintains files of copies as introduced unofficially. (Hereinafter the revised Administrative Procedure Act, as introduced and unenacted will be referred to as H.B. 69. Within the sections of the bill are the sections of the act, and citations to specific portions of the bill will be by reference to the statutory section of the appropriate section of the bill).

[8] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(3) of § 1 at 9: "Shall be entitled to the benefit of legal counsel of his own choosing" was amended by striking the word "legal" before "counsel" and adding the words "or other person" after "counsel" and by adding a poviso that "A person other than a counsel representing a party at a hearing may question or cross-examine witnesses or present argument." It would seem that the effect of the proviso would be to prohibit a "counsel" from questioning or cross-examining witnesses or presenting argument. H. JOURNAL, 44th Colo. Gen. Assem., 1st Sess. at 597 (1963).

[9] The bill was not reported out of the Senate Judiciary Committee by the end of the session and died under state procedure.

[10] COLO. REV. STAT. § 3-16-6 (1963).

[11] COLO. REV. STAT. § 3-16-1 (1963).

[12] COLO. REV. STAT. § 3-16 (1963).

[13] COLO. REV. STAT. § 3-16-2 (1963).

[14] COLO. REV. STAT. § 3-16-2 (1963).

posed, and either the substance of the proposed rule or a description of the subjects and issues involved.[15]

The agency must afford interested persons an opportunity to submit written data, views, or arguments concerning proposed rules. Unless the agency deems it unnecessary, such views can be presented orally at the hearing. In any case, the agency must consider all submissions.[16]

A rule becomes effective on the date prescribed in the rule, but this effective date may not be less than twenty days after publication of the rule's adoption.[17]

A temporary or emergency rule may be adopted without the holding of a hearing and without notice where the agency finds that "immediate adoption of the rule is imperatively necessary for the preservation of public health, safety or welfare, and compliance with the requirements [for notice and postponement of effective date] . . . would be contrary to the public interest."[18]

Any interested person has the right to petition for the issuance, amendment, or repeal of a rule. These petitions are open to public inspection. The agency does not have to act on every petition, but once it has undertaken rule-making on a certain subject, all petitions relevant to the subject matter must be considered and acted upon.[19]

An agency is required to maintain a register of (1) its currently effective rules, (2) the current status of each published proposal for rules, and (3) minutes of all its actions upon rules.[20] Copies of any rule then in effect or of any notice of a proposed rule-making proceeding in which action has not been completed must be made available to the public; the agency must deliver a copy to anyone requesting it and paying the cost of copying. Unless it has been published and made available to the public, no rule can be relied upon or cited by the agency against any person.[21]

Each agency is required to maintain a mailing list, which must include the attorney general and every other person who has requested that he be placed on the list and paid the fee set to cover the mailing cost.[22] The prescribed method of publication or giving of any notice, either of a proposed rule-making proceeding, or of the adoption of a rule, is by mailing a copy to each person on the

[15] COLO. REV. STAT. § 3-16-2(3) (1963).
[16] COLO. REV. STAT. § 3-16-2(4) (1963).
[17] COLO. REV. STAT. § 3-16-2(5) (1963).
[18] COLO. REV. STAT. § 3-16-2(6) (1963).
[19] COLO. REV. STAT. § 3-16-2(7) (1963).
[20] COLO. REV. STAT. § 3-16-2(4) (1963).
[21] COLO. REV. STAT. § 3-16-2(10) (1963).
[22] COLO. REV. STAT. § 3-16-2(11) (1963).

mailing list, and by placing and keeping a copy on permanent file in the agency's office available for public inspection.[23]

Investigation of the practice of a number of specific agencies indicates a wide variation in the practical application of the above provisions. The State Department of Public Welfare charges $12 a year for placing a name on its mailing list. Usually, twenty days before each monthly board meeting, the Department sends a notice of all matters to be considered at the meeting, and after each meeting, it sends another notice of the actions taken. The Colorado State Department of Public Health puts names on its mailing list without charging a fee. However, it has not in all cases followed the law requiring the giving of notice of adoption of regulations; some of its regulations therefore may not be in effect.[24] The Colorado State Board of Pharmacy charges $2 for placement on its mailing list, within the fee renewable upon request from the board. Rule-making proceedings before the pharmacy board are infrequent, and consequently there is no need for frequent mailing of notices. The author's request to be placed on the mailing list of other agencies brought these results: from the State Civil Service Commission, notices of all the examinations to be held; from the Colorado State Department of Employment, nothing; from the Department of Revenue, notices about the new income tax regulations.

B. *Licensing*[25]

A proceeding for the revocation, suspension, annulment, limitation, or modification of a license is not to be commenced until the agency has given the licensee notice in writing of facts or conduct that may warrant such action and has afforded him an opportunity to submit written data, views, and arguments with respect to such facts or conduct.[26] Except in cases of deliberate and willful violation, the licensee must be given reasonable opportunity to comply with all lawful requirements. Such a proceeding is commenced by the filing of a written and signed complaint stating the name of the licensee complained against and the grounds for the requested action. No previously issued license shall be revoked, suspended, annulled, or modified until after a hearing.[27]

---

[23] In addition, "each state agency which regulates a public activitiy or which requires forms to be filed by either private or public groups, agencies or businesses . . ." is required to file copies of all rules, regulations and forms with the Legislative Council before the convening of the 1967 General Assembly. HOUSE JOINT RES. 1024, 45th Colo. Gen. Assem., 1st Sess., para. (2)(F) (1965), recorded in Colo. Sess. Laws 1965, at 1503, 1506.

[24] COLO. REV. STAT. § 3-16-2(10) (1963).

[25] COLO. REV. STAT. § 3-16-3 (1963).

[26] COLO. REV. STAT. § 3-16-3(4) (1963).

[27] COLO. REV. STAT. § 3-16-3(6) (1963).

Notwithstanding these requirements, where "the agency has reasonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation, or that the public health, safety, or welfare imperatively requires emergency action, and incorporates such findings in its order . . ."[28] it may summarily suspend the license without notice.

A licensee who seeks renewal of a license, or who seeks a new license for previously licensed continuing activity, must make timely and sufficient application to the agency. If he does so, his license does not expire until his application is finally acted upon.[29] If the application is denied or the terms of the new license limited, his license does not expire until judicial review has been sought or the time for judicial review has elapsed.[30]

C. *Hearings*[31]

A person entitled to notice of a hearing must be given timely notice of the time, place, nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.[32]

The present law provides that the agency shall preside at the taking of evidence. However, if so provided by law, a member or members of the body which constitute the agency or a hearing commissioner, may preside in lieu of the agency as a body.[33] Whoever the presiding officer is, he must conduct his functions in an impartial manner. He may withdraw if he deems himself disqualified.[34] If any party files an affidavit charging that the presiding officer is personally biased or otherwise disqualified, the presiding officer must determine the issue as a matter of record in the case.[35] The presiding or deciding officer must be independent of supervision or direction by any officer, employee, or agent engaged in the performance of investigatory or prosecuting functions for the agency.[36]

The presiding officer has generally the same authority over the conduct of the hearing as does a judge in the district court.[37]

---

[28] COLO. REV. STAT. § 3-16-3(4) (1963).
[29] COLO. REV. STAT. § 3-16-3(7) (1963).
[30] *Ibid.*
[31] COLO. REV. STAT. § 3-16-4 (1963).
[32] COLO. REV. STAT. § 3-16-4(2) (1963).
[33] COLO. REV. STAT. § 3-16-4(3) (1963).
[34] *Ibid.*
[35] *Ibid.*
[36] COLO. REV. STAT. § 3-16-4(6) (1963).
[37] COLO. REV. STAT. § 3-16-4(4) (1963).

He may administer oaths and affirmations, issue subpoenas, rule upon the offers of proof, receive evidence, hear and dispose of motions, and otherwise regulate the course of the hearing.[38] Subpoenas must be issued without discrimination at the request of either public or private parties.[39] Proceedings to enforce a subpoena may be brought in the district court.[40] The court must sustain the subpoena if it is found to be in accordance with law and must issue an order requiring the appearance of witnesses or the production of data under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court.[41]

The rules of evidence, requirements of proof, and procedures before the agency are generally the same as those in civil nonjury cases in the district courts.[42] Usually the proponent of an order has the burden of proof.[43] An agency may take notice of general, technical, or scientific facts within its knowledge, but the fact so noticed must be specified in the record or brought to the attention of the parties before final decision, with opportunity in every party to controvert the fact so noticed.[44] "Every party and every person compelled to testify or to submit data or evidence . . . shall be entitled to the benefit of counsel and to retain, or on payment of reasonable charges therefore to procure, copy of the transcript of the record or any portion thereof."[45]

D. *Judicial Review*[46]

Actions of the agency may be judicially reviewed in two ways: (1) in a civil or criminal action brought by the agency to enforce its action; or (2) in a district court action for review filed by an aggrieved or adversely affected person in accordance with the Colorado Rules of Civil Procedure. Any person affected adversely or aggrieved by reviewable agency action has standing to seek judicial review, whether or not he was a party to the agency action.[47] The action for review may be brought against the agency, individuals comprising the agency, or a person representing the agency or acting

[38] *Ibid.*
[39] COLO. REV. STAT. § 3-16-4(5) (1963).
[40] *Ibid.*
[41] *Ibid.*
[42] COLO. REV. STAT. § 3-16-4(4) (1963).
[43] COLO. REV. STAT. § 3-16-4(7) (1963).
[44] COLO. REV. STAT. § 3-16-4(8) (1963).
[45] COLO. REV. STAT. § 3-16-4(9) (1963).
[46] COLO. REV. STAT. § 3-16-5 (1963).
[47] COLO. REV. STAT. § 3-16-5(3) (1963).

on its behalf in the matter sought to be reviewed. When an agency record has been made, review is on its record.[48] It is, therefore, extremely important that a complete and detailed record be made before the agency. If a record was not made before the agency, or if the alleged procedural errors or irregularities do not appear in the agency record, a record for appellate review is made by trial in the reviewing court.[49]

If the reviewing court finds no error, it shall affirm the agency action. If it finds error, the court must hold unlawful and set aside the agency action, restrain the enforcement of the order or rule under review, compel the agency to take any action which it has unlawfully withheld or unduly delayed, remand the case for further proceedings, or afford such other relief as may be appropriate.[50] Any of the following may be grounds for setting aside agency action: (1) arbitrary or capricious action; (2) denial of statutory right; (3) action contrary to constitutional right, power, privilege, or immunity; (4) action in excess of statutory jurisdiction, authority, purposes, or limitations; (5) action not in accord with the procedures or procedural limitation of the administrative procedure act or otherwise required by law; (6) abuse or clearly unwarranted exercise of discretion; (7) action based upon findings of fact that are clearly erroneous on the whole record; (8) action unsupported by the evidence; or (9) otherwise contrary to law.[51] The decision of the district court may be reviewed by the Supreme Court upon writ of error.[52]

Upon a finding that irreparable injury would otherwise result, the agency must postpone the effective date of the agency action pending judicial review.[53] The reviewing court, whether or not an application for postponement has been denied by the agency, shall, upon a finding of irreparable injury, or to preserve the rights of the parties pending conclusion of the review proceedings, postpone the effective date of agency action, and may enjoin, upon a showing of irreparable injury, the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency.[54] If the court finds that any proceeding contesting

[48] COLO. REV. STAT. § 3-16-5(2) (1963).
[49] COLO. REV. STAT. § 3-16-5(6) (1963).
[50] COLO. REV. STAT. § 3-16-5(7) (1963).
[51] *Ibid.*
[52] *Ibid.*
[53] COLO. REV. STAT. § 3-16-5(5) (1963).
[54] COLO. REV. STAT. § 3-16-5(8) (1963).

the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff costs and a reasonable sum for attorney's fees [or an equivalent sum in lieu thereof].[55]

## II. EXCEPTIONS TO THE APA

Although most of the recently enacted statutes relating to administrative agencies have adopted most or all of the provisions of the APA by reference,[56] many provisions remain, particularly in statutes enacted prior to the APA that do conflict with the APA. The number of conflicts can and should be held to a minimum by strictly and narrowly construing the crucial provision that "where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[57] Only if there is an actual conflict between the APA and the statute applying to any specific agency, does the latter control, and then only to the extent of the specific conflict.

Nevertheless, many areas of major conflict remain. Even a shade of difference between provisions in individual statutes and those in the APA may make an important difference in a particular situation. Statutes relating to some agencies, particularly the Industrial Commission, create great divergence in agency procedures. It would be impractical to enumerate here all the conflicting provisions, but an attempt will be made to set forth the major ones.

### A. *Problems of Review*

The most noticeable differences between specific controlling statutes and the APA provisions arise in the area of judicial review. The APA does not specify the county in which judicial review shall commence. However, individual controlling statutes variously provide that review shall commence in the City and County of Denver,[58] in the county of residence or place of business of the appellant or

---

[55] *Ibid.*

[56] *E.g.*, Colo. Sess. Laws 1966, ch. 44, § 5(1)(f) at 203; Colo. Sess. Laws 1966, ch. 45, § 7(5)(c) at 219.

[57] COLO. REV. STAT. § 3-16-6 (1963).

[58] COLO. REV. STAT. §§ 15-2-7 (1963) (Board of Examiners of Barbers, unfair practices); 32-2-7 (1963) (Board of Cosmetology, price regulation); 72-1-11 (1963) (Insurance Department, revocation of certificate of authority); 72-5-3 (1963) (Insurance Department, mutual insurance); 72-9-6 (1963) (Insurance Department, mutual benefit associations); 72-10-20 (1963) (Insurance Department, sickness and accident insurance); 72-14-8(1) (1963) (Insurance Department, unfair competition); 72-14-10 (1963) (Insurance Department, unfair competition—intervenors); 73-3-18 (1963) (Bank Commissioner, consumer finance—small loans law); 125-1-22 (1963) (Commissioner of Securities, licensing and practice act).

in which a particular act took place,[59] in any district court in Colorado,[60] or in the federal courts.[61] Some statutes provide that the action in the district court shall be *de novo*,[62] and one provides that the appellant may have a jury trial.[63]

Nowhere is the confusion greater than in denominating the review action. The APA says, "Any other case of review of agency action shall be commenced by the filing of an action for review in the district court in accordance with the rules of civil procedure."[64] Some statutes provide, however, that the review shall be by certiorari,[65] certiorari or other proper method,[66] certiorari or other-

---

[59] COLO. REV. STAT. §§ 1-1-9(1) (1963) (Abstracters' Board of Examiners, licensing and regulation); 14-17-9(6) (Supp. 1965) (Banking Department, industrial banks); 32-1-21 (1963) (Board of Cosmetology, registration); 51-1-6(9) (Supp. 1965) (Board of Registration for Professional Engineers); 61-1-25 (1963) (Board of Funeral Directors and Embalmers); 68-2-6 (1963) (restaurant licensing, issuance of license); 68-2-9 (1963) (restaurant licensing, revocation of license); 69-7-7(2) (1963) (Anti-discrimination Commission, fair housing act); 72-1-21 (1963) (Insurance Department, insurance brokers); 72-9-29 (1963) (Insurance Department, mutual benefit associations); 75-1-7 (1963) (liquor licensing, low alcohol content); 75-2-8(2) (1963) (liquor licensing, high alcohol content); 80-4-8(8) (1963) (Industrial Commission, Labor Peace Act); 80-10-10 (1963) (Industrial Commission, theatrical employment agencies); 80-21-8 (1963) (Industrial Commission, antidiscrimination); 112-8-8 (1963) (State Engineer, floating logs on streams); 116-10-13 (1963) (Public Utilities Commission, railroad safety appliances); 116-13-11 (1963) (Public Utilities Commission, railroad employees); 125-7-14 (1963) (Bank Commissioner, money order act); 129-3-3(24) (1963) (Secretary of State, bingo and raffles law); 138-5-3(5) (1963) (Director of Revenue, sales and use tax); 138-9-4(2) (Supp. 1965) (Director of Revenue, income ton mile, sales and use tax, cigarette and motor fuel taxes); 145-1-2(5)(c) (1963) (Board of Veterinary Medicine); 148-5-12 (Supp. 1965) (State Engineer, reservoir storage rights); 148-11-17 (1963) (State Engineer, water flow and diversions for irrigation); 148-18-14 (Supp. 1965) (State Engineer, ground water management act).

[60] COLO. REV. STAT. § 125-2-4 (1963) (Commissioner of Securities, investment contracts).

[61] COLO. REV. STAT. §§ 100-6-11 (1963) (Oil and Gas Conservation Commission, conservation act: "if it [the district court] otherwise has jurisdiction. . . ."); 125-2-4 (1963) (Commissioner of Securities, investment contracts: "in proper case, to the federal courts."). See generally 28 U.S.C. §§ 1331-61 (1948) (jurisdiction of the district courts); U.S. CONST. art. III, § 1. *E.g.*, 28 U.S.C. § 1342 (1948). The jurisdiction stated in the Colorado Revised Statutes sections mentioned above is in addition to concurrent jurisdiction in the state courts.

[62] COLO. REV. STAT. §§ 1-1-9 (1963) (Abstracters' Board of Examiners, licensing and regulation); 13-16-3 (1963) (Bank Commissioner, licensing of retail instalment sales of motor vehicles companies); 61-1-25 (1963) (Board of Funeral Directors and Embalmers); 72-1-11 (1963) (Insurance Department, revocation of certificate of authority of insurance companies); 72-1-21(4) (1963) (Insurance Department, insurance brokers); 100-6-13 (1963) (Oil and Gas Conservation Commission, conservation act); 125-2-4 (1963) (Commissioner of Securities, investment contracts); 138-9-4(2)(b) (Supp. 1965) (Director of Revenue, income, ton mile, motor fuel, cigarette, sales and use taxes); 148-18-14(4) (Supp. 1965) (State Engineer, ground water management act).

[63] COLO. REV. STAT. § 72-1-21(4) (1963) (Insurance Department, insurance brokers).

[64] COLO. REV. STAT. § 3-16-5(4) (1963).

[65] COLO. REV. STAT. §§ 62-6-15(3) (1963) (Game and Fish Commission, fur-bearing animals, fur dealers licenses); 91-5-10 (1963) (Board of Examiners in the Basic Sciences, licensing to practice the "healing art").

[66] COLO. REV. STAT. § 75-1-7(6) (1963) (liquor licensing, low alcohol content fermented malt beverages).

wise,[67] appeal or writ of certiorari,[68] writ of certiorari or review,[69] certiorari as is provided in the APA,[70] and mandamus or otherwise.[71] Moreover, the Colorado Supreme Court has said that there is a statutory review provided for by the APA which is not necessarily a review under Rule 106 of the Rules of Civil Procedure.[72] These differences in language and interpretation may suggest the possibility of conflicts even though the ramifications of such possibility remain unclear.

Prescribed procedures for initiating review are varied. The statute concerning liquidation of banks provides that "Notice of review in the district court shall be filed with said bank commissioner within thirty days after his decision is announced, whereupon the state bank commissioner shall report the facts to the court with a petition that said court pass upon the validity of the claim."[73] A taxpayer may take an appeal from action of the Director of Revenue by filing with the clerk of the court a copy of the notice of final determination received by the taxpayer together with a written notice stating that the taxpayer appeals to the district court and alleging the pertinent facts upon which such appeal is grounded.[74] Appeals from the Board of Funeral Directors and Embalmers are made by filing notice in writing of such appeal with the clerk of the district court and mailing a copy of such notice of appeal to the secretary of the board.[75]

Under the Rules of Civil Procedure an agency would have twenty days to file its answer. Statutes applicable to the Board of Examiners of Barbers and to the Commissioner of Securities require the agency to file its answer in ten days.[76]

Although the APA does not require the furnishing of security on judicial review, some statutes require the appellant to put up a bond, usually for costs.[77] A public utility appealing a decision of

---

[67] COLO. REV. STAT. § 75-2-8(2) (1963) (liquor licensing, high alcohol content).

[68] COLO. REV. STAT. § 72-14-7(2) (1963) (Insurance Department, unfair competition).

[69] COLO. REV. STAT. §§ 115-6-15(1) to -16(1) (1963) (Public Utilities Commission, conduct of hearings and investigations).

[70] COLO. REV. STAT. § 138-3-12 (Supp. 1965) (Director of Revenue, cigarette tax).

[71] COLO. REV. STAT. §§ 68-2-6 (1963) (Department of Health, issuance of restaurant license); 68-2-9 (1963) (Department of Health, revocation of restaurant license).

[72] Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

[73] COLO. REV. STAT. § 14-14-11 (1963) (Banking Department, liquidation of banks).

[74] COLO. REV. STAT. § 138-9-4(3) (Supp. 1965) (Director of Revenue, ton mile, motor fuel, cigarette, income, sales and uses taxes).

[75] COLO. REV. STAT. § 61-1-25(2) (1963) (Board of Funeral Directors and Embalmers).

[76] COLO. REV. STAT. §§ 15-2-7(2) (1963) (Board of Examiners of Barbers, unfair practices); 125-2-4(1) (1963) (Commissioner of Securities).

[77] COLO REV. STAT. §§ 1-1-9(1) (1963) (Abstracters' Board of Examiners, licensing and regulation); 13-11-17 (1963) (Motor Vehicle Dealers' Administrator and Advisory Board, dealers' licenses); 112-8-8 (1963) (State Engineer, floating logs on streams); 148-11-17(3) (1963) (State Engineer, water flow and diversions for irrigation).

the state tax commission must pay the full amount of all taxes levied upon the valuation for assessment of its property and plant prior to taking its appeal.[78] One very obnoxious and unfair provision of doubtful constitutionality is the provision that before taking an appeal a taxpayer must file with the district court a bond in twice the amount of the taxes, interest, and other charges stated in the final determination by the director of revenue or at his option deposit the stated amount of taxes with the director of revenue in lieu of posting bond.[79] The fact that in one district court case[80] the state did not raise the issue of the failure of the taxpayer to comply with either of these provisions may indicate that the agency also doubts the validity of the provisions.

Another statute provides that no suit shall be maintained in any court to restrain or prevent the collection of the motor fuel tax, but an aggrieved distributor shall pay the tax, penalty, and interest under protest and may institute suit within ninety days to recover such taxes and penalty.[81]

Under the APA, the filing of an action for review does not automatically stay the decision of the agency. However, the APA does provides that the agency or the court may postpone the effective date of agency action, upon a finding that irreparable injury would otherwise result, or to preserve the rights of the parties pending conclusion of the review proceedings.[82] Some statutes provide that the filing of an action for judicial review shall automatically

---

[78] COLO. REV. STAT. § 137-4-9(2) (Supp. 1965) (State Board of Equalization, ad valorem general property tax). The provision has doubtful constitutionality.

[79] COLO. REV. STAT. § 138-9-4(4) (Supp. 1965) (Director of Revenue, income, ton mile, passenger mile, motor fuel, cigarette, sales and use taxes). The constitutional objection is that a person should not be required to file an appeal bond in a penal sum, particularly in a sum double the taxes, interest "and other charges" when the taxpayer has never been in court about the validity of the sum alleged. If the taxpayer has already been in court, and is taking an appeal *to a higher court from a lower court,* there is a distinguishable fact, *e.g.,* COLO. REV. STAT. § 37-6-11 (1963) (Repealed, Colo. Sess. Laws 1964, ch. 45, § 73, at 436, replaced by § 54, at 428) provided that appeals from county court were conditioned on bond double the amount of a *money judgment.* See also COLO. REV. STAT. §§ 139-36-8 to -10 (1963), for appeals from a municipal court. In Mardi, Inc. v. City and County of Denver, 151 Colo. 28, 375 P.2d 682, noted in 40 DEN. L.C.J. 149 (1962), the supreme court considered the provision of the ad valorem tax law that required payment of taxes before taking appeal, COLO. REV. STAT. § 137-3-38 (1963). The court did not address itself to the question of whether the bond or payment of taxes was invalid in all instances but held that it was invalid as it applied to Mardi. The taxes normally do not have to be paid until March, and therefore, the fact that a taxpayer appeals before March does not accelerate his duty to pay taxes before filing the appeal. The basic question, whether any taxpayer must pay remains unanswered. However, referring to other cases, the court said that appeals from administrative determinations should be subject to liberal rules of statutory construction, "when, as here, the appealing parties have acted in good faith and with reasonable promptness." 151 Colo. at 34, 375 P.2d at 685.

[80] Henry v. Theobald, Civil No. B-39283, D. Colo., 1957. Compare Liebhardt v. Department of Revenue, 123 Colo. 369, 229 P.2d 655 (1951), on tax questions involved in a prior estate.

[81] COLO. REV. STAT. § 138-2-16 (1963) (Director of Revenue, motor fuel tax).

[82] COLO. REV. STAT. § 3-16-5(5) (1963).

postpone the effective date of the agency action.[83] Other statutes provide that the effective date of the agency action shall not be stayed except upon notice to the agency and the furnishing of a bond,[84] or without the furnishing of a bond,[85] or without notice and hearing.[86] Two statutes provide that the determination of the agency is final until final determination of the court review.[87]

Grounds for setting aside agency action are as varied in specific agency statutes as the hues of the rainbow. However, many of such statutes, even though at some variance with the APA are not sufficiently different from the APA to justify separate or detailed consideration. Briefly enumerated, particular statutory grounds include a finding or determination that: the agency abused its discretion or exceeded its jurisdiction; [88] the action was unlawful or unreasonable,[89] was without good cause,[90] was arbitrary and without good cause,[91] was arbitrary and without just cause,[92] or arbitrary,[93] was unreasonable, unjust, arbitrary or capricious or violated any constitutional right of the party;[94] the agency acted without or in excess of its power; the finding, order or award was procured by fraud; that the award does not do substantial justice to the parties;[95] or that the agency was guilty of gross negligence or an abuse of

[83] COLO. REV. STAT. §§ 1-1-9 (1963) (Abstracters' Board of Examiners, licensing and regulation); 7-4-10 (1963) (Department of Agriculture, commission and brokerage marketing); 7-12-8(2) (1963) (Department of Agriculture, frozen food provisioner's law); 61-1-25 (2) (1963) (Board of Funeral Directors and Embalmers); 72-10-20 (1963) (Insurance Department, sickness and accident insurance); 80-4-8(10) (1963) (Industrial Commission, labor peace act); 80-21-8(10) (1963) (Industrial Commission, antidiscrimination); 112-8-9 (1963) (State Engineer, floating logs on streams).

[84] COLO. REV. STAT. §§ 15-2-7(3) (1963) (Board of Examiners of Barbers, unfair practices); 32-2-7(4) (1963) (Board of Cosmetology, price regulation); 129-3-3(24)(d) (1963) (Secretary of State, bingo and raffles).

[85] COLO. REV. STAT. §§ 72-1-11(3) (1963) (Insurance Department, revocation of certificate of authority of insurance companies); 100-6-12 (1963) (Oil and Gas Conservation Commission, conservation act); 115-6-16(3) (1963) (Public Utilities Commission, hearings and investigations).

[86] COLO. REV. STAT. § 80-1-38 (1963) (Industrial Commission, powers and duties).

[87] COLO. REV. STAT. §§ 13-11-17 (1963) (Motor Vehicle Dealers' Administrator and Advisory Board); 148-5-12 (Supp. 1965) (State Engineer, reservoir storage rights).

[88] COLO. REV. STAT. § 14-17-2(6) (Supp. 1965) (Banking Department, industrial banks).

[89] COLO. REV. STAT. § 15-2-7(2) (1963) (Board of Examiners of Barbers, unfair practices).

[90] COLO. REV. STAT. §§ 68-2-6 (1963) (Department of Health, issuance of restaurant license); 68-2-9 (1963) (Department of Health, revocation of restaurant license).

[91] COLO. REV. STAT. § 75-1-7(6) (1963) (liquor licensing authorities, fermented malt beverage, low alcohol content).

[92] COLO. REV. STAT. § 138-1-84 (Supp. 1965) (Director of Revenue, income tax).

[93] COLO. REV. STAT. § 75-2-8(2) (1963) (liquor licensing authorities, hard liquor).

[94] COLO. REV. STAT. § 100-6-13 (1963) (Oil and Gas Conservation Commission, conservation act).

[95] COLO. REV. STAT. §§ 80-1-40(1)(e) (1963) (Industrial Commission, powers and duties); 81-14-12 (1963) (Industrial Commission, workmen's compensation procedure).

discretion.[96] In the case of one agency specific grounds for setting aside its action on review are not enumerated, but rather the "court shall make such decree . . . as to the court may seem just and proper."[97]

B. *Problems with rule-making*

The APA varies greatly from particular statutory provisions concerning rule-making. Some statutes provide for a different time of notice of rule-making than that prescribed by the APA[98] and others for a different lapse of time between adoption and effective date.[99] The statute controlling the Oil and Gas Conservation Commission provides that a temporary rule shall not be effective for more than fifteen days.[100]

In some instances, notice of rule-making proceedings or of the adoption of a rule, or both, is to be given by newspaper publication.[101] One statute permits newspaper publication of a notice of rule-making proceeding in lieu of personal service.[102] Some agencies are required to give notice of the adoption of rules by posting on

---

[96] COLO. REV. STAT. § 128-1-10 (1963) (Board of Appeals of Soil Conservation Board, soil conservation districts).

[97] COLO. REV. STAT. § 51-2-10(7) (1963) (Board of Registration for Professional Engineers, surveyors).

[98] COLO. REV. STAT. §§ 6-13-12 (1963) (Department of Agriculture, commercial fertilizers, 10 days); 66-15-5(3)(b) (1963) (Department of Public Health, enriched flour and bread, 10 days); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, 30 days); 100-6-7(2) (1963) (Oil and Gas Conservation Commission, conservation act, 10 days).

[99] COLO. REV. STAT. §§ 7-3-12 (1963) (Department of Agriculture, marketing orders, 5 days); 62-2-13(1) (1963) (Game, Fish and Parks Commission, 2 days); 66-15-5 (3)(b) (1963) (Department of Public Health, enrichment of flour and bread act, 30 days); 66-20-19(3) (1963) (Department of Public Health, pure food and drug law, 60 days unless in case of emergency); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, 60 days); 73-3-11(1) (1963) (Bank Commissioner, consumer finance law—small loans, 30 days); 80-1-9(7) (1963) (Industrial Commission, rules and regulations, 10 days); 80-1-10(1) (1963) (Industrial Commission, orders, 10 days); 80-4-3(4) (Supp. 1965) (Industrial Commission, labor peace act, 10 days); 80-7-10(2) (1963) (Industrial Commission, minimum wage for women and children, Wage Board, 30 days); 81-7-8 (1963) (Industrial Commission, workmen's compensation, 10 days); 82-3-2 (1963) (Department of Employment, employment security, 10 days).

[100] COLO. REV. STAT. § 100-6-7(15) (1963) (Oil and Gas Conservation Commission).

[101] COLO. REV. STAT. §§ 7-3-12 (1963) (Department of Agriculture, marketing act of 1939, adoption); 7-5-6 (1963) (Department of Agriculture, fruits and vegetables, adoption); 7-5-7 (1963) (Department of Agriculture, fruits and vegetables, adoption); 62-2-13 (1963) (Game, Fish and Parks Commission, adoption); 66-15-5(5) (1963) (Department of Public Health, enrichment of flour and bread act, both); 66-21-5(1)(a) (1963) (Department of Public Health, hazardous household substances labeling act, both); 80-7-10(1) (1963) (Industrial Commission, Wage Board, minimum wage for women and children, adoption); 82-3-2 (1963) (Department of Employment, employment security, adoption).

[102] COLO. REV. STAT. §§ 148-18-11 (Supp. 1965) (State Engineer, Ground Water Commission, ground water management act); 148-18-30 (Supp. 1965) (State Engineer, Ground Water Commission, board of directors of ground water management district, ground water management act). One statute allows newspaper publication as an alternative. See COLO. REV. STAT. § 100-6-7(4) (1963) (Oil and Gas Conservation Commission, conservation act).

a bulletin board in the office of the agency;[103] other agencies must file adopted rules with the secretary of state.[104] Some statutes provide that notice of rule-making proceedings or notice of the adoption of rules, or both, shall be sent to all licensees or all persons known to be interested, or all persons of a particular class.[105] Finally, one statute specifically provides that the provisions of the APA are not applicable to rule-making proceedings.[106]

C. *Problems in licensing*

The APA requires a complaint for the suspension or revocation of a license to be in writing and signed by the complainant. The more strict requirement of several statutes is that such a complaint be either under oath or verified.[107] The statute pertaining to the Industrial Commission provides that a complaint of violation of the law regarding wage equality between the sexes must be verified.[108]

Some statutes provide that a license shall be suspended or revoked by operation of law,[109] and one of these provides that the certificate shall be revoked by operation of law without hearing.[110] Certainly these phrases cannot be taken literally, because the licensee would be entitled to a hearing at least on the question of whether or not "operation of law" has set in.

The APA provides for the emergency suspension of a license without notice and without a hearing, where "the agency has rea-

---

[103] COLO. REV. STAT. §§ 15-2-5(1) (1963) (Board of Examiners of Barbers, unfair practices); 32-2-5(1) (1963) (Board of Cosmetology, price regulation); 80-1-9(7) (1963) (Industrial Commission); 81-15-26 (1963) (Industrial Commission, workmen's compensation insurance rates).

[104] COLO. REV. STAT. §§ 10-1-4(4) (1963) (Board of Examiners of Architects); 82-3-2 (1963) (Department of Employment, employment security).

[105] COLO. REV. STAT. §§ 2-1-20 (1963) (Board of Accountancy); 7-3-5(3) (1963) (Department of Agriculture, marketing act of 1939); 7-5-7 (1963) (Department of Agriculture, fruits and vegetables act, interested persons); 73-3-11 (1963) (Bank Commissioner, consumer finance—small loan law); 80-7-10(2) (1963) (Industrial Commission, Wage Board, minimum wage for women and children); 81-7-8 (1963) (Industrial Commission, workmen's compensation); 148-18-30 (Supp. 1965) (State Engineer, board of directors of ground water management district).

[106] "The provisions of article 16 of chapter 3, C.R.S. 1963, shall not be applicable, except that 3-16-5, Colorado Revised Statutes 1963 shall apply" Colo. Sess. Laws 1966, ch. 7, § 6, at 11 (Department of Highways, junkyards) (to be codified to COLO. REV. STAT. § 120-16-6).

[107] COLO. REV. STAT. §§ 11-3-8(2) (Supp. 1965) (Bank Commissioner, debt adjustment); 51-1-6(6) (Supp. 1965) (Board of Registration for Professional Engineers); 51-2-10(2) (1963) (Board of Registration for Professional Engineers, surveyors); 97-1-22(1) (1963) (Board of Nursing, professional nursing practice act).

[108] COLO. REV. STAT. § 80-3-3 (1963) (Industrial Commission, wage equality between sexes act).

[109] COLO. REV. STAT. § 123-17-21(3) (1963) (Department of Education, teachers' certificates, suspended without a hearing); Colo. Sess. Laws 1966, ch. 39, §§ 4(9), at 183 (agent's permit); 5(6)(a) at 185 (proprietary school certificate); 10(2) at 189 (revocation of permits and certificates). (Proprietary School Act of 1966 to be codified to COLO. REV. STAT. § 146-3-1).

[110] COLO. REV. STAT. § 123-17-21(3) (1963) (Department of Education, teacher's certificate).

sonable grounds to believe and finds that the licensee has been guilty of deliberate and willful violation, or that the public health, safety, or welfare imperatively requires emergency action. . . ."[111] A number of statutes place a limitation of time on the period during which such emergency suspension shall be in effect.[112] One statute provides for 3 days' written notice and a hearing before even making an emergency suspension.[113]

D. *Other problem areas*

The APA is very explicit that *ex parte* testimony cannot be taken. However, one statute provides that the agency with or without notice to either party, "may cause testimony to be taken. . . . All *ex parte* testimony taken by the commission shall be reduced to writing and either party shall have opportunity to examine and rebut the same on final hearing."[114]

Under the APA the "rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts."[115] However, several statutes provide that the specific agency is not bound by technical rules of evidence or strict rules of procedure.[116]

There is some confusion in the statutes concerning the enforcement of an agency subpoena. The APA recognizes the ordinary method of proceeding — application to the court for a court order requiring obedience to the subpoena, with punishment by the court for contempt of its order in case there is refusal to comply.[117] Some statutes make it a misdemeanor to willfully ignore an agency sub-

---

[111] COLO. REV. STAT. § 3-16-3(4) (1963).

[112] COLO. REV. STAT. §§ 6-14-4(6) (1963) (Department of Agriculture, application of agricultural chemicals, 10 days); 14-19-12(1) (1963) (Banking Department, funeral contract trust funds, 30 days); 62-6-16(4) (1963) (Game, Fish and Parks Commission, fur dealers, 6 months); 68-2-9 (1963) (Department of Health, hotel or restaurant license, 6 months); 75-2-11(2) (1963) (liquor licensing authorities, summary suspension for 15 days, suspension for 6 months); 100-6-7(3) (1963) (Oil and Gas Conservation Commission, 15 days); 129-3-3(2) (1963) Secretary of State, bingo and raffles law, 30 days); 129-3-3(7) (1963) (Secretary of State, bingo and raffles law, may stop game pending a hearing not later than 10 days).

[113] COLO. REV. STAT. § 14-19-12(1) (1963) (Banking Department, funeral contract trust funds).

[114] COLO. REV. STAT. § 80-1-35(3) (1963) (Industrial Commission). Compare COLO. REV. STAT. § 81-14-3(3) (1963) (Industrial Commission, workmen's compensation).

[115] COLO. REV. STAT. § 3-16-4(7) (1963).

[116] COLO. REV. STAT. §§ 2-1-21(6) (1963) (Board of Accountancy); 10-1-21(2) (1963) (Board of Examiners of Architects); 23-1-16(2) (1963) (Board of Chiropractic Examiners); 69-7-6(11) (1963) (Antidiscrimination Commission, fair housing); 72-14-6(3) (1963) (Insurance Department, unfair competition); 80-1-22 (1963) (Industrial Commission); 80-1-28 (1963) (Industrial Commission); 80-7-7 (1963) (Industrial Commission, Wage Board, minimum wage of women and children); 80-21-7 (11) (1963) (Industrial Commission, antidiscrimination); 82-5-7(1) (1963) (Department of Employment, employment security—unemployment compensation); 91-6-16(2) (1963) (Board of Physical Therapy); 97-1-22(2) (1963) (Board of Nursing); 115-6-1 (1963) (Public Utilities Commission).

[117] COLO. REV. STAT. § 3-16-4(5) (1963).

poena[118] — a provision of doubtful constitutionality. Perhaps the most illustrative example of this confusion is the procedure for enforcement provided by the legislature if a taxpayer fails or refuses to respond to a subpoena. In such a case the judge, upon application, "may cause arrest of such person, and upon hearing, said judge shall have, for the purpose of enforcing obedience to the requirements of said subpoena, power to make such order as, in his discretion, he deems consistent with the law for punishment of contempts."[119] This provision was adopted in 1965 despite court decisions indicating that such procedure is undoubtedly unconstitutional and could not be upheld by a court. The bill drafters and legislators who should have been enlightened by and benefited from such decisions nevertheless ignored them in approving this clause.

## III. PROPOSAL FOR REFORM

The best method to overcome the major shortcomings of the APA would be the adoption of the revised State Administrative Procedure Act (hereinafter revised act) presented by the Administrative Law Committee of the Colorado Bar Association to the Colorado General Assembly in 1963.[120] The 1963 bill would have done away with many of the conflicts between the APA and other statutes by specifically repeating sections in those statutes which deviated from the APA.[121] The proposed revisions to the APA itself included a number of changes of considerable materiality, along with improvements in language which clarified, but did not substantially change, the meaning of certain provisions.[122] The changes of greatest materiality will be discussed here.

The revised act offically designates the act as the "State Administrative Procedure Act,"[123] the name it has had unofficially from the beginning.

### A. *Hearing officers*

The greatest single change is the provision for the appointment of hearing officers and the conducting of hearings by such officers.[124] The bill provides that "at a hearing only one of the follow-

[118] COLO. REV. STAT. §§ 80-8-13 (1963) (Industrial Commission, wage law); 81-14-21 (1963) (Industrial Commission, workmen's compensation); 82-3-8(2) (1963) (Department of Employment, employment security); 117-1-15 (1963) (Real Estate Brokers Board).

[119] COLO. REV. STAT. § 138-9-11(2) (Supp. 1965) (Director of Revenue).

[120] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. (1963).

[121] *Ibid.*

[122] *Ibid.*

[123] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-7 of § 1, at 21 (1963).

[124] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4 of § 1, at 8-17 (1963).

ing may preside: The agency; a hearing officer appointed in accordance with subsection [9] of this section, or if otherwise authorized by law a hearing officer, who, if authorized by law may be a member of the body which comprises the agency."[125]

Although a number of agencies have their own hearing officers,[126] it was necessary the revised act provide for a panel of hearing officers for those agencies that do not have their own. Under the above provision an agency could conduct a hearing through its own hearing officer, or through a hearing officer selected from the panel.

Subsection [9][127] provides that in order to maintain an adequate panel of qualified hearing officers, the governor shall appoint a sufficient number of hearing officers, each of whom shall continue as a member of the panel for a period of six years unless removed for cause by the governor. All hearing officers must be attorneys at law duly admitted to practice before the Supreme Court of Colorado, must have been practicing attorneys in Colorado for at least three years, and must be familiar with the conduct of administrative proceedings. The officers on the panel would not all be members of the same political party. They would not be under civil service. A member of the panel would be designated as chief hearing officer and would receive a salary of $100 a month in addition to other compensation provided for. When an agency wished to delegate the holding of a hearing to an officer appointed in accordance with this sub-section, it would so advise the chief hearing officer, who would then select an officer to hold the hearing. Hearings would be apportioned, so far as practicable, equally among the respective hearing officers. Notwithstanding this, the chief hearing officer would consider the potential hearing officer's knowledge of the field of law involved, his place of residence, the place where the hearing would be held, and all other factors. The hearing officer would receive from the agency $50 for each one-half day, or $100 for each full day engaged in the conduct of hearings or matters directly connected therewith; and if the hearing were held outside the place of residence of the hearing officer, he would receive mileage at the statutory rate and necessary subsistence expenses. The bill provides that the hearing officer may employ a court reporter, who shall be paid by the agency, to attend the hearing and record the proceedings or he may cause the proceedings to

[125] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4 of subsection 8, at 11. Compare COLO. REV. STAT. § 3-16-4 (1963).

[126] *E.g.*, State Water Pollution Control Commission, Colo. Sess. Laws 1966, ch. 44, § 5(1)(h) at 203; Air Pollution Variance Board, Colo. Sess. Laws 1966, ch. 45, § 7(5)(c) at 219.

[127] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(9) of § 1, at 12 (1963).

be recorded by electronic recording device. When required, the hearing officer shall cause the proceedings to be transcribed, the cost to be paid by the agency or the party ordering the transcription. If the agency acquires a copy of the transcription, its copy must be made available to any party at reasonable times for inspection and study.

The record made by the hearing officer or agency conducting a hearing includes all pleadings, applications, evidence, exhibits, other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any party, and any written brief filed.[128] Oral argument may be permitted.[129] No *ex parte* material or representation of any kind may be received or considered. The agency or hearing officer with the consent of all parties may eliminate or summarize any part of the record where this may be done without affecting the decision.[130]

When a hearing officer has conducted the hearing, he must prepare and file an initial decision which the agency shall serve upon each party, unless all parties with the consent of the agency have expressly waived their right to have an initial decision rendered by such hearing officer.[131] Each initial decision must include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction, relief, or denial thereof.[132] In the absence of an appeal to the agency or a review upon motion of the agency itself within thirty days after service of the initial decision, the initial decision of the hearing officer shall become the decision of the agency.[133]

For the the purpose of review by the agency of the initial decision of the hearing officer, either upon appeal or upon the agency's own motion, the record includes — in addition to the findings, conclusions and rulings stated in the initial decision — any exceptions and briefs filed. The agency may permit oral argument on review, but no other material may be considered.[134] The findings of evidentiary fact as distinguished from ultimate conclusions of fact made by the hearing officer in his initial decision shall not be set aside by the agency, unless such findings of evidentiary fact are

---

[128] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(14) (1963).

[129] *Ibid.*

[130] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(13) of § 1, at 15 (1963).

[131] *Ibid.*

[132] *Ibid.*

[133] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(13) of § 1, at 16 (1963).

[134] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(14) (1963).

contrary to the weight of the evidence.[135] The agency may remand the case to the hearing officer for further proceedings; or it may affirm, set aside, or modify his order so that the sanction or relief entered therein will conform with the facts and the law.[136]

The initial decision of the hearing officer, or if the agency conducts the hearing, its decions, shall be served on each party by personal service or first class mail and shall be effective as to such party on the date mailed or such later date as is stated in the decision.[137]

B. *Evidentiary Rules*

Relief from the strict rules of evidence is provided by the addition in the revised act of the following provision: "However, when necessary to do so in order to ascertain facts affecting the substantial rights of the parties to the proceeding, the person so conducting the hearing may receive and consider evidence not admissible under such rules, provided it possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs."[138] The revised act also provides that documentary evidence may be received in the form of a copy or excerpt if the original is not readily available, provided that upon request the opposing party shall be given an opportunity to compare the copy with the original. Also, an agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.[139]

C. *Judicial Review*

The revised act restates more clearly the proposition in the present act that two methods of judicial review of agency action are available to an adversely affected or aggrieved party. He may defend a court action brought by the agency to seek enforcement, or he may commence a separate action against the agency in the district court in accordance with the rules of civil procedure.[140] Two important qualifications are added by the revised act, however. Firstly, contrary to the APA, which does not limit the time

[135] *Ibid.*

[136] *Ibid.*

[137] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(15) of § 1, at 17 (1963).

[138] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(11) of § 1, at 15 (1963). See note 116 *Supra* and accompanying text.

[139] *Ibid.* Compare COLO. REV. STAT. § 3-16-4(8) (1963).

[140] *Compare* COLO. REV. STAT. § 3-16-5 (1963), *with* H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5 of §1, at 17-18, *and with* Revised Model State Administrative Procedure Act § 15 [hereinafter referred to as Model Act], and notes 58-71 *supra* and accompanying text.

within which review may be sought, the revised act provides that the independent action for review must be brought within sixty days after the agency action becomes effective.[141] And secondly, while under the present act any person may commence an action for judicial review, under the revised act only a party to the agency action has standing to commence such an action for judicial review.[142]

Judicial review is also affected by the following changes in the revised act. A court may require a party who seeks an order of court postponing agency action to comply with terms and to provide security before the court enters such an order. Parties to a review action may reduce the record by stipulation. The revised act provides that, before seeking review of a district court action in the Supreme Court, a party must file with the district court a notice of intent to seek such review.[143] If no notice of intent to seek Supreme Court review is filed with the trial court within such thirty days, the trial court shall immediately return the agency's record to it. When the Supreme Court disposes of a case, it returns the agency record to the trial court if further proceedings are required in the trial court; if no further proceedings are necessary, it either returns the record directly to the agency or the trial court, which must then forward the record to the agency. Both the district court and the Supreme Court shall advance on the docket any case which in the discretion of the court requires acceleration.[144]

D. *Additional Improvements*

The word "rule" is used throughout the present APA, and the word "regulation" is ignored. The revised act provides that the "words 'rule' and 'regulation' are synonymous and may be used interchangeably."[145]

The present law requires the rule to state the effective date in the rule, which shall not be earlier than twenty days after adoption. The revised act provides that a rule goes into effect twenty days after publication unless a later effective date is stated in the rule.[146]

The revised act eliminates the provision that the agency must issue a concise statement of the matters considered in adopting or

---

[141] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(4) (1963).

[142] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(3) (1963).

[143] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(9) (1963).

[144] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-5(10) (1963).

[145] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-1(1)(d) of § 1, at 1-2. *Compare* COLO. REV. STAT. § 3-16-1(1)(d) (1963), *with* Model Act § 1(7).

[146] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(4) of § 1, at 4 (1963). *Compare* COLO. REV. STAT. § 3-16-2(5) (1963), *with* Model Act § 4(b).

rejecting a rule and the reasons therefore.[147] This provision has not been effectively followed to date.[148]

The revised act eliminates the provision that "no revocation, suspension, annulment, limitation or modification by any agency of a license shall be lawful unless, before institution of agency proceedings therefor, the agency shall have given the licensee notice in writing of facts or conduct that may warrant such action, afforded the licensee opportunity to submit written data, views, and arguments with respect to such facts or conduct, and except in cases of deliberate and willful violation, given the licensee a reasonable opportunity to comply with all lawful requirements."[149] Under the revised act, an agency must act promptly on an application for license and immediately after the taking of action give written notice of the action to the applicant.[150]

An agency upon its own motion may commence proceedings for the revocation, suspension, annulment, limitation or modification of a previously issued license, but if a complaint is filed by someone else, the complaint must be signed and sworn to.[151]

The revised act does not affect statutory powers of an agency to issue an emergency order where the agency finds and states of record that immediate issuance of the order is imperatively necessary for the preservation of public health, safety, or welfare and observance of the requirements of notice of hearing would be contrary to the public interest. Any person against whom an emergency order is issued is entitled upon request to an immediate hearing.[152]

The revised act provides that witnesses at agency hearings are entitled to the same fees and mileage provided for witnesses in a court of record.[153]

Each agency must proceed with reasonable dispatch to conclude any matter presented to it, giving prompt notice of refusal to accept for filing or denial in whole or in part of any written application or other request. Upon a showing to a court that there has been undue delay in connection with any such proceeding or

---

[147] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(4) of § 1 at 4 (1963). Compare Model Act § 3(a)(2), which also requires a concise statement of reasons.

[148] See p. 19 *supra.*

[149] COLO. REV. STAT. § 3-16-3(3) (1963); Compare, H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3 of § 1, at 6-8 (1963); Model Act § 14(c).

[150] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(3) of § 1, at 6-7 (1963). Compare note 147 *supra.*

[151] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(8) of § 1, at 8 (1963). Compare COLO. REV. STAT. § 3-16-3(5) (1963).

[152] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-3(7) of § 1, at 7. Compare COLO. REV. STAT. § 3-16-3(4) (1963); Model Act § 14(c).

[153] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(4) of §1, at 10 (1963).

action, the court may direct the agency to decide the matter promptly.[154]

Every agency must provide by rule for the discretionary entertaining and prompt disposition of petitions for declaratory orders terminating controversies or removing uncertainties. Orders disposing of such petitions shall constitute agency action subject to judicial review.[155]

One very desirable addition to the revised act which was not incorporated in the version presented to the General Assembly in 1963 is a provision for the establishment of a Colorado Regulations Register.[156] Everything required by the APA to be published should be published in a register to be issued by the secretary of state or other state officer. All persons should be entitled to be on a mailing list to receive all or part of the publications made in the register. The officer making publication should determine the fee to be charged for making mailings, and copies of the register should be readily available at stated places, for example in the Supreme Court Library and the office of the clerk of each district court. There should also be a provision requiring each agency to deliver to a designated officer a copy of each regulation of the agency in effect on a given date and requiring the agency to publish all such regulations in the regulations register.

## CONCLUSION

The Colorado Administrative Procedure Act arose out of need or expediency demanding coordination and an explicit statement of the statutory provisions regulating procedures of the state's many administrative agencies. Hopefully such action would achieve uniform procedures for all agencies within the state. Although the APA has performed a major function in regulating those procedures since its enactment, it does not achieve the uniformity of procedure which is highly desirable for our rapidly growing structure of agencies.

Procedures of individual agencies are still too much governed by specific statutes applicable only to specific agencies. Confusion is particularly apparent in the area of judicial review, where the statutes state myriad provisions for initiating appeal and grounds

---

[154] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(6) of § 1, at 11 (1963).

[155] H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-4(7) of § 1, at 11 (1963).

[156] An amendment which would have provided for such a register was drafted. Memorandum to Senator Paul Wenke from Hubert D. Henry, Feb. 15, 1963. The amendment was proposed in the Senate Judiciary Committee, but as was stated, note 5 *supra*, the bill was never reported out of committee and the amendment never was printed in the Journal. The amendment would have added the provision for the register in H.B. 69, 44th Colo. Gen. Assem., 1st Sess. § 3-16-2(10) of § 1, at 5-6 (1963), substituting it for the printed subsection (10).

for setting aside agency action. Vast inconsistencies also exist in provisions for the adoption of rules, for the revocation of licenses, and for the taking of evidence in agency hearings.

The adoption of the revised Administrative Procedure Act which was first presented to the General Assembly in 1963 would remedy the major deficiencies of the present APA. By repeal of conflicting provisions in specific statutes, the revised act would eliminate areas of conflict and make the APA uniformly applicable to all state agencies. The revised act's major substantive change would create a central panel of hearing officers, who could be delegated to conduct hearings for any agency in accord with procedural requirements of the APA. Judicial review procedures would be more exactly defined in the revised version.

In addition to the changes proposed in 1963, a revised APA should incorporate a provision for a Colorado Regulations Register, which would publish all rules and notices required by the APA to be published.

To eliminate the confusion and uncertainty caused by the present diversity of regulations, the revised Administrative Procedure Act should be re-presented to the General Assembly at the earliest possible time, and should be enacted into law.

# CONSTITUTIONAL PROTECTIONS FOR THE JUVENILE

BY
TED RUBIN*
RICHARD S. SHAFFER**

*Judge Rubin and Mr. Shaffer engage in an intriguing analysis of the juvenile court system today. Their discussion focuses on the challenge posed by the injection of constitutional safeguards into that system. The authors demonstrate by analysis the lack of due process in the present system and the resultant failure of the primary purposes of the juvenile court. To maintain the integrity of the juvenile court, it is necessary to consider methods of acquiring constitutional protections for the juvenile. The authors conclude that adoption of basic safeguards into the present juvenile system will realize great rewards for the system and the child. These rewards far outweigh the practical difficulties that would be encountered in the adoption of the recommended constitutional protections.*

## INTRODUCTION

THE revolutionary introduction in 1899 of the juvenile court into a previously two-pronged civil and criminal judicial system was accompanied by the magnificent hopes of its creators. One such hope was that individualized justice for the child would henceforth be a reality.

Today we are in the midst of a second transformation: procedural safeguards traditionally reserved for the criminal system are being injected into the juvenile system. The authors propose to examine the historical development of the juvenile court system, the current practices within the system, and the necessity for completing this transformation now in progress.

Beginning in the 1870's, the judicial system was severely criticized, in part, for its inability to adapt to new legal problems which accompanied urbanization.[1] The increased crime rate, domestic problems, small claims of individuals, and youthful offenders of the law[2] were of mounting concern to reformers. It was against this background that the juvenile court was born. Specialization of the courts was hopefully a panacea for the ills of the former system. Hence, in addition to the creation of small claims courts, municipal

* Judge, Denver Juvenile Court, Denver, Colorado; B.A., Penn. State Univ., 1948; M.S.S.A. Western Reserve Univ., 1960; J.D., De Paul Univ., 1956.

** B.A., Dickinson Univ., 1964; J.D., Univ. of Denver, 1966.

[1] See HURST, THE GROWTH OF AMERICAN LAW, ch. 8 (1950); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 19 A.B.A. REP. 395 (1906).

[2] HURST, *op. cit. supra* note 1.

courts for traffic offenders, and domestic relations courts, the juvenile court arose.[3]

Noble intentions accompanied the development of the juvenile court. The court "avoids the stigma"[4] which attaches to criminal court charges. It "made the child visible"[5] in a proceeding conducive to individualized justice. The court would provide care which would "approximate as nearly as may be that which should be given by its parents."[6] "[T]he judge and all concerned were merely trying to find out what could be done on his behalf."[7] As one writer stated, "[E]mphasis is laid, not on the act done by the child, but on the social facts and circumstances that are really the inducing causes of the child's appearance in court. The particular offense which was the immediate and proximate cause of the proceedings is considered only as one of the many other factors surrounding the child. The purpose of the proceeding here is not punishment but correction of conditions, protection of the child, and care and prevention of a recurrence through the constructive work of the court. Conservation of the 'child' as a valuable asset of the community, is the dominant note."[8] Unfortunately not all of these goals have been attained.[9]

## I. THE JUVENILE COURT TODAY

### A. *Comparison with the Adult System*

To place the juvenile proceeding in perspective, a brief comparison between the juvenile system and the adult criminal system will be made. When contrasted with the juvenile system, the criminal system has two distinct characteristics: the proceeding is formal and punishment is a primary purpose. The criminal action is generally brought against the defendant by the district attorney representing the people. The defendant is usually represented by counsel — either of his own selection or by court appointment. The trial is an adversary proceeding. The *parens patriae* philosophy of the juvenile court[10] is absent in the criminal court. In the latter, the

---

[3] Nicholas, *History, Philosophy, and Procedures of Juvenile Court*, 1 J. FAM. L. 151 (1961).

[4] Schramm, *Philosophy of the Juvenile Court*, 261 Annals 101 (1949).

[5] Lathrop, quoted in LUNDBERG, UNTO THE LEAST OF THESE, 119 (1947).

[6] ILL. ANN. STAT. § 701 (Supp. 1965).

[7] Addams, quoted in JUSTICE FOR THE CHILD 14 (Rosenheim ed. 1962).

[8] FLEXNER & BALDWIN, JUVENILE COURTS AND PROBATION, 6-7 (1916).

[9] See generally Sloane, *Juvenile Court: An Uneasy Partnership of Law and Social Work*, 5 J. FAM. L. 170 (1965), which suggests that the conflict between legal and social norms is at the root of the fundamental problems of the juvenile courts.

[10] A typical definition of the doctrine is:

> The term parens patriae is defined as the father or parent of his country; in England, the King; in America, the people; the government is thus spoken of in relation to its duty to protect and control minor children and guard their interests.

Helton v. Crawley, 241 Iowa 296, 305, 41 N.W.2d 60, 70 (1950).

prevailing attitude is that if the defendant has violated the law he should be punished.

Due process safeguards are more prominent in criminal proceedings; the requirement of these protections has been specifically set forth by appellate court decisions.[11] These decisions have expressly enunciated the application of the fifth, fourteenth and other amendments to the procedures related to the adult system of criminal justice. But the Supreme Court of the United States has ruled only once on a juvenile delinquency case,[12] and there have been comparatively few appellate court decisions regarding delinquency. Accordingly, there is no pervading constitutional application of due process to juvenile proceedings. In its absence the juvenile correctional system has inconsistently and on a piecemeal basis interpolated criminal due process safeguards to the juvenile.[13] As a result juvenile courts have applied *ad hoc* a procedural yardstick of fundamental fairness.[14]

The criminal system adheres more stringently to the common law requisites of a crime, *i.e., mens rea* and *actus reus*. The juvenile system on the other hand is premised on the principle that a child has only an incomplete ability to formulate the criminal intent necessary to violate a law. Less severe sanctions are therefore utilized in the juvenile system, partly because of the incomplete *mens rea*.[15]

Traditionally, the rehabilitation of the child was more important to the juvenile court than the adjudicative determination of a law violation, and probation counselors were employed to aid in this objective.

In many juvenile courts the probation staffs are still hired by the judge. This situation may diminish the working independence of the staff in that its work conforms to the views of the judge. This situation exists even when juvenile probation staffs are not hired directly by the judge. In the adult system there is less dialogue between judge and probation staff, and frequently even less between probation staff and probationers. Although case loads are higher than desirable in most juvenile courts, case loads are generally far

---

[11] *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952); People v. Fitzgerald, 244 N.Y. 307, 155 N.E. 584 (1927); *In re* Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954) (dissenting opinion).

[12] Kent v. United States, 383 U.S. 541 (1966).

[13] See, *e.g.*, Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

[14] See Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966); Welch, *Delinquency Proceedings — Fundamental Fairness for the Accused in a Quasi — Criminal Forum*, 50 MINN. L. REV. 653, 664-694 (1966).

[15] See Westbrook, *Mens Rea in the Juvenile Court*, 5 J. FAM. L. 121 (1965), which emphasizes that the traditional concept of *mens rea* is not applicable to juvenile proceedings. It should be used only as an objective criteria which must be satisfied before a violation can be found.

heavier in the adult system. As a result probation counseling is far more standardized and less intensive than in the juvenile system.

Most adult probation workers seem to be less adequately trained than juvenile court staffs. Even so, untrained staff members in both systems have often performed effectively. The limited professionalism in the juvenile probation and parole system has been partially counteracted by the employment of psychological and psychiatric personnel affiliated with the courts and by rather close liaison with child guidance and mental health clinics. Mental health professionals are still primarily used in the juvenile system for diagnostic recommendations and occasional treatment, but are increasingly being used as staff trainers and consultants. The adult system has not utilized mental health personnel nearly as much, confining them primarily to diagnostic procedures in determining whether or not an adult offender is criminally insane.

Juvenile probation officers are involved with the child and his family very early in the process, obtaining a social history and beginning the rehabilitative relationship. Adult officers, on the other hand, because of a less flexible system, wait and approach their task more formally.

Juvenile courts utilize detention home care for children pending official disposition, although detention facilities are grossly inadequate throughout the country. Certain courts have developed this temporary detention into a constructive experience for the child, in contrast to the usually sterile experience in the city or county jail for the adult offender.

Attorneys who practice in criminal courts frequently have difficulty making the transition to a juvenile court case. They are not accustomed to a non-adversary proceeding, and their understanding of the juvenile system is hampered by a general lack of orientation to this court during law school training.[16] Despite this, they do tend to give more total consideration to the effect of this proceeding upon the child. For example, a lawyer in juvenile court may recommend that the youthful client admit responsibility to a petition in order to help the child develop an improved concept of responsibility and honesty. In the adult court, a lawyer more frequently sees his duty as providing an adequate defense rather than encouraging his client to admit to guilt in clear cases of guilt. One reason for this difference may be the more severe sanctions possible for the offender in the criminal court.

The right to be represented by counsel has not been clearly defined for juvenile courts, although it appears likely that counsel

[16] Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1964).

will be provided in some situations to the youthful offender.[17] Juvenile court procedures are not as well-defined by statute or court decision as those in the adult system. Children far more frequently admit to the petition than do adults to the information or indictment. The adult receives greater notice of his rights and the procedures affecting him than does the child. Moreover, juvenile judges not infrequently lack legal training, whereas such training is a prerequisite to being a judge in the criminal system.

B. *Instituting the Juvenile Proceeding*

Turning specifically to the juvenile system, the juvenile court proceeding is characterized as civil in nature.[18] The action is commenced by the state through a delinquency petition, not against the juvenile offender, but rather on his behalf. Once the petition has been filed, the court must either sustain or dismiss the petition. While the quantum of proof requisite for conviction, "beyond a reasonable doubt," has never been in doubt for the adult system, no specific standard has yet been established to adjudicate delinquency in juvenile courts. The juvenile court has alternative standards of proof available to adjudicate delinquency. Since the proceeding is civil, the court may apply either a preponderance of the evidence[19] or a clear and convincing standard;[20] it may also elect to apply the higher criminal standard of "beyond a reasonable doubt."[21] Judges are not uniform in the application of any of these criterion. For example, at a meeting of judges in Colorado in 1966, three judges indicated that they each utilized a different quantum of proof. It is clear that inconsistencies and unequal justice may

[17] For legislation providing a right to assigned counsel for indigent juvenile offenders, see CAL. WELFARE & INST'NS CODE § 507 (1966); N.Y. FAMILY CT. ACT § 728 (1963). See Ketcham, *Legal Renaissance in the Juvenile Court,* 60 NW. U.L. REV. 585 (1965) (foresees assumption by legal profession of responsibility to represent children in juvenile court); Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court,* 4 J. FAM. L. 77 (1964) (predicting other states will enact legislation providing right to counsel).

[18] Kent v. United States, 383 U.S. 541 (1966); United States v. Borders, 154 F. Supp. 214 (N.D. Ala. 1957); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); *Re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); People v. Lewis, 260 N.Y. 171, 183 N.E. 353, *cert. denied,* 289 U.S. 709 (1932); State v. Thomasson, 275 S.W.2d 463 (Tex. 1955); State *ex rel.* Berry v. Superior Ct., 139 Wash. 1, 245 Pac. 409 (1926); McKesson, *Right to Counsel in Juvenile Proceedings,* 45 MINN L. REV. 843 (1961).

[19] See, *e.g.,* People v. Lewis, 260 N.Y. 171, 183 N.E. 353, *cert. denied,* 289 U.S. 709 (1932); State v. Ferrell, 209 S.W.2d 642 (Tex. Civ. App. 1948); Robinson v. State, 204 S.W.2d 981 (Tex. Civ. App. 1947); State *ex rel.* Berry v. Superior Ct., 139 Wash. 1, 245 Pac. 409 (1926).

[20] See, *e.g.,* Holley Coal Co. v. Globe Ind. Co., 186 F.2d 291 (4th Cir. 1950); Jensen v. Housley, 297 Ark. 742, 182 S.W.2d 758 (1944); Lynch v. Lichtenthaler, 85 Cal. App. 2d 437, 193 P.2d 77 (1948); *In re* Mazanec's Estate, 204 Minn. 406, 283 N.W. 745 (1939); Coddington v. Jenner, 57 N.J. Eq. 528, 41 Atl. 874 (1898); First Nat'l Bank v. Ford, 30 Wyo. 110, 216 Pac. 691 (1923).

[21] *In re* Madik, 233 App. Div. 12, 251 N.Y. Supp. 765 (1931) (juvenile court case). *But see In re* Bigesby, 202 A.2d 785 (D.C. Cir. 1964) (juvenile court case).

occur when judges within the same state apply a different standard of proof. A case now pending before the United States Supreme Court[22] hopefully will determine the appropriate measure.

Following the adjudication of delinquency, the court must make its finding and order. The court customarily hears a report from the probation counselor before making its final order. This report is usually oral and concerns the environmental factors surrounding the child. The court will then enter its order, which is read in open court to the child and his parents.

C. *Sentencing the Juvenile*

Numerous alternatives for disposition are available to the judge, ranging from institutionalization of the juvenile to placing him on probation. Currently in some states the court may maintain jurisdiction over a child for as long as eleven years.[23] Juvenile courts frequently impose indeterminate sentences on the child.[24] In this manner the juvenile proceedings often result in longer periods of restriction or incarceration for juveniles than the courts are allowed to impose on an adult found guilty of a similar crime.[25]

Since there is a reluctance on the part of a juvenile court judge to take the child away from his parents and his home, the child is frequently placed on probation. In the federal system, for example,

> During the year ending June 30, 1960, 10,391 (38.9 percent) adult offenders of a total of 26,728 sentenced and convicted in federal courts were placed on probation, and 690 (48.3 percent) of a total of 1,428 convicted and sentenced juvenile offenders were granted the same privilege.[26]

Probation is granted even more frequently in state juvenile courts.

Probation has long been employed to keep the family together and to facilitate the child's adjustment in his familial environment. While the juvenile is on probation legal authorities maintain careful watch and control over the individual to assist the probationer in his new start in life. Probation also serves as a control imposed upon the wrongdoer to protect society from the recurrence of his wrongful conduct. The court continues jurisdiction over the child

---

[22] Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965); *appeal docketed*, 34 U.S.L. WEEK 3409 (U.S. May 31, 1966) (No. 1273); *prob. juris. noted*, 34 U.S.L. WEEK 3428 (U.S. June 21, 1966) (No. 1273) (No. 1273, 1966 Term; renumbered No. 116, 1967 Term).

[23] See, *e.g.*, COLO. REV. STAT. § 22-8-11 (1963).

[24] *Ibid.*

[25] Siler, Jr., *The Need for Defense Counsel in the Juvenile Court*, in 11 CRIME AND DELINQUENCY 45, 56 (1965).

[26] Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 487 (1962), citing The 1960 Ann. Rep. Administrative Office of the United States Courts 304-09 (1961).

during the probation period. Thus the court is enabled to supervise the program of rehabilitation and reintegration of the juvenile.

Two major problems arise when considering probation in juvenile cases. The first is the nature of the rules and conditions imposed on the probationer; the second concerns the procedure adopted for the revocation of probation.

In juvenile as well as criminal cases, probation has traditionally been treated as a matter of judicial "grace" and not a matter of right.[27] Hence, certain conditions of probation have withstood challenges[28] of being cruel and unusual punishment under the eighth amendment. They have also been held not violative of the due process clauses of the fifth and fourteenth amendments.[29] However, a condition requiring the probationer to attend Sunday School was declared unconstitutional under the first amendment.[30] The court stated, "no civil authority has the right to require anyone to accept or reject any religious belief or to contribute any support thereto."[31]

One condition which is utilized is the suspension of the juvenile's drivers license. Despite the fact that many juvenile courts do not have jurisdiction over traffic offenses, this condition may be imposed.[32] Moreover, this condition may be applied even when offenses are not related to automobiles. The probation counselor may feel that it is easier to control the individual if he does not have extensive mobility.

Other conditions commonly applied include requiring school attendance, restricting the probationer's associations, prohibiting the frequenting of taverns,[33] and ordering the probationer to obey his parents. The requirement of attending school is a condition probably beneficial in most cases. However, if the probationer is above the compulsory attendance age, the condition may be a method of keeping him off the streets and under constant surveillance. Such use may be of dubious value; the compulsory attendance statute is designed to assist a child in attaining an education. If the child's presence in court is caused by a problematic situation at school, such a condition may not aid him in achieving an education, but may only aggravate his problem. The condition should not be used when this result seems likely.

---

[27] *Cf.* Rubin, Sol, *Probation and Due Process of Law,* in 11 CRIME AND DELINQUENCY 30 (1965).

[28] Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945).

[29] People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957).

[30] Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

[31] *Id.* at 344-345, 38 S.E.2d at 448.

[32] Sheridan, *Standards for Juvenile and Family Courts,* U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE 37 (1966).

[33] Some states permit the sale of beverages with 3.2% alcohol content to minors after they reach age eighteen.

Utah has adopted a statutory provision enabling the juvenile court judge to place the child on probation, but conditional upon the child's parents undergoing medical, psychological, or psychiatric treatment.[34] This provision is not typical and would seem to infringe upon the rights of the parents — especially since they are before the court as guardians and not as violators of the law. On the other hand, a condition requiring parental cooperation in a mental health study of the child would not be subject to the foregoing objection.

Historically a mental health evaluation of the child has been a common practice. Since the 1909 inauguration of the Chicago Juvenile Court — related Juvenile Psychopathic Institute and the Judge Baker Foundation in Boston in 1917, juvenile courts have directly provided clinical evaluation of children or have arranged for the examination at nearby child guidance or mental health clinics. Even though the psychiatrists and psychologists could make a greater overall contribution to a larger number of court-acquainted children as staff trainers and consultants, their diagnostic and treatment plan recommendations in an advisory capacity can be extremely valuable to judge and staff.

If the court decides to place the child on probation, but away from his parents, restrictions may be placed upon parental visitation rights. In such a case the child may be placed in a foster home, through public or private child placing agencies, or in public or private group care facilities, or in the juvenile detention home. There is considerable reluctance to assign a child to the juvenile hall for any extended period of time; usually it is a receiving center pending hearing. Because of the lack of other facilities, the detention hall has also become the setting for enforced school attendance programs, headquarters for work programs, and a temporary placement facility for children who have violated probation or who are awaiting placement away from home.

The court may decide to place the child on probation, but in the home of a friend or relative. This condition enables the juvenile to be in familiar surroundings, associating with people he knows. Under these circumstances, conflicts may arise between the parents and the persons caring for the child. With proper counseling, placement review, and work with the parents, however, these animosities can be minimized.

Courts are increasingly developing work camps or day or weekend work programs as rehabilitation devices and as alternatives to the delinquency institution. These are generally well accepted by the public and offer ample opportunities for creative change in the

[34] UTAH CODE ANN. § 55-10-84 (1953). See Winters, *The Utah Juvenile Court Act of 1965*, 9 UTAH L. REV. 509 (1965).

child. But if poorly administered and arbitrarily used, these programs could pose difficulties in attaining the rehabilitative goal. They may interfere with the normal schooling of the child, require excessive or dangerous work, be programmed without corresponding counseling, continue for unreasonable periods of time, or be essentially punitive in nature. Serious problems of due process would arise with an ill-executed work program.

When juvenile courts exhaust available local sources and resort to state facilities for institutionalization the preferable method is for centralized commitment to the Youth Authority or to the appropriate state department administering the different state delinquency programs. The state department should then determine which of its facilities is most appropriate for the rehabilitation of the particular child. Transfers between state institutions — as from basic delinquency institution to the forestry camp — can thus be facilitated.

Although a judge may know particular juveniles and all state facilities well enough to determine which facility will best meet the individual's needs, the state department is in a better overall position to finally decide which facility should be utilized. Currently, statutes vary on the method of commitment. As more states fulfill their obligation to provide an array of alternatives, however, it is hoped that more statutes will provide for this centralized commitment.

The correctional institutions in some states are stratified on the basis of age. It is possible in a number of jurisdictions for both criminal and juvenile courts to sentence offenders to the same reformatory. Since the criminal offender may be convicted under a higher standard of proof, *i.e.,* beyond a reasonable doubt, than that which was applied in the juvenile court, the juvenile offender may be denied equal protection under the fourteenth amendment. Further, no juvenile should be committed to a state penitentiary from the juvenile court since the state penitentiary is clearly intended for adjudicated criminals and a child cannot be adjudicated a criminal in juvenile court.

### D. *Appeal by the Juvenile*

Once the court has passed sentence on the offender, the juvenile has the right to appeal the court's decision. Presently this right is rarely exercised. Reasons for failure to appeal may be the lack of counsel in juvenile proceedings, inadequacy of notice of the right to appeal, or inadequacy of notice of the right to appointive counsel on appeal if indigent. Moreover, some juvenile courts fail to keep or maintain adequate records which are insufficient transcripts on which to base an appeal. Regardless of why there are few appeals,

when they do occur, the record is protected to maintain the confidentiality of the name of the child.

If the juvenile has been placed on probation and violates the conditions thereof, probation may be revoked by court. Notice and hearing on the revocation of probation are not consistently required for juveniles.[35]

E. *Waiver*

At the onset of the juvenile proceeding or when an adjudicated delinquent commits another offense, a serious problem of jurisdiction arises. In many states, the juvenile court and adult criminal courts have concurrent jurisdiction over felonies committed by sixteen and seventeen year old juveniles; hence, the juvenile court may waive jurisdiction to the adult court. Such a determination may depend upon the court in which the district attorney has brought the action[36] or it may be made by the juvenile judge.[37] The procedure followed in such cases may raise constitutional questions of due process.[38]

Juvenile court judges today may hesitate to apply the constitutional protection of the fourteenth amendment due to an incomplete understanding of "due process." Portions of the fifth and sixth amendments specifically refer to criminal proceedings.[39] However, neither the fourth nor the fourteenth amendment is limited to the criminal context. Because the juvenile proceeding is "civil" in nature, the court may feel the protections afforded by these amendments do not apply to juvenile hearings. But "due process of law" is a broader concept which applies to civil as well as criminal hearings. Especially when the juvenile court is confronted with a violator who may be subjected to punitive penalties, the distinction between "civil" and "criminal" actions seems unrealistic. Hopefully the courts are not basing their non-application of certain elements of due process, such as the right to counsel, which have been delineated in a criminal context, on this fictitious distinction.

---

[35] Sheridan, *supra* note 32 at 90. See also MODEL PENAL CODE § 301.4, comment (Tent. Draft No. 2, 1954 and Tent. Draft No. 4, 1955).

[36] People *ex rel.* Marks v. District Court of Adams County, 420 P.2d 236 (Colo. 1966).

[37] Kent v. United States, 383 U.S. 541 (1966).

[38] *Ibid.*

[39] "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

## II. CRITIQUE OF PRESENT SYSTEM

Re-evaluation of the juvenile court has been stimulated by certain developments in the area of criminal law. Procedural safeguards guaranteed by the United States Constitution have been delineated more precisely than in the past. For example, protection against unreasonable search and seizure,[40] against prolonged detention,[41] against involuntary confessions,[42] from arbitrary police practices,[43] and of right to counsel[44] have recently been litigated in the Supreme Court of the United States. By its decisions, the Court has strengthened these protections and once again drawn attention to the due process rights of criminal defendants.

Another factor contributing to this investigation of the juvenile system has been the increasing incidence of juvenile crime. Congress, recognizing this rapid increase, responded by passing the U.S. Juvenile Delinquency Control Act in 1961.[45] As a result, comprehensive community counterattacks on the causes of delinquency were launched and were subsequently merged with anti-poverty programs, and training centers for delinquency personnel were initiated. Manpower needs in this field were critical.

The critique which accompanied judicial attention to due process in criminal cases and legislative enactments to control delinquency was basically centered on two issues: the juvenile proceeding itself and the staff and facilities of the juvenile system.

The juvenile proceeding poses numerous procedural problems of due process. The juvenile court when created was not intended to deny fundamental fairness to its participants. One purpose of the system was to provide a fair hearing in an informal and flexible atmosphere. But under the doctrine of *parens patriae* the system has substituted a paternalistic standard for fairness which may not always equal the due process standard.[46]

In the system today many juveniles confess to offenses. These offenders are interrogated by the police before being charged. Under the philosophy of the court, the rehabilitation of the child is more easily ascertained when all the facts, no matter how discovered, are before the court. But due process may require more; *Miranda v.*

---

[40] Mapp v. Ohio, 367 U.S. 643 (1961).

[41] Mallory v. United States, 354 U.S. 449 (1957).

[42] Powell v. Alabama, 287 U.S. 45 (1932).

[43] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[44] Gideon v. Wainwright, 372 U.S. 335 (1963).

[45] Juvenile Delinquency and Youth Offenses Control Act, 75 Stat. 572 (1961), 42 U.S.C. §§ 2541-48 (1961).

[46] See note 10 *supra* for a definition of the *parens patriae* doctrine. See *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966).

*Arizona*[47] and *Gideon v. Wainwright*[48] may require that such interrogation only be in the presence of counsel or parent and that the court appoint counsel to assist the indigent. Because of these decisions the parents and child may have to have notice of the hearings and of their legal rights — including the right to remain silent. Other constitutional problems are present. Must the juvenile be granted a hearing at which he is represented by counsel for revocation of probation or parole, or when the juvenile court seeks to waive jurisdiction?[49] Must he be provided with counsel at the initial proceeding and on appeal? What type notice must he have of his legal rights? Are confessions, statements, and the evidence discovered from the information given in a confession or statement admissible into evidence at the hearing? Must the juvenile be granted a hearing when he is transferred from the delinquency institution to a reformatory — especially in light of the fact that the latter usually requires a higher standard of proof for conviction and commitment than the former would? Finally, the problem remains of whether the indeterminate sentence is valid and the continuing jurisdiction of the court constitutional — must these sentences be reviewed periodically?

Numerous other problems, in addition to the lack of constitutional safeguards, exist. Despite state statutes prohibiting the jailing of children,[50] numerous juveniles are incarcerated in jails annually. Children may be punished or their freedom restricted when they have not committed a crime, *e.g.,* for truancy or incorrigibility.[51] "Arithmetical justice" is frequently meted out to juveniles; for the first offense, probation; for the second offense, suspended sentence to a delinquency institution; for the third offense, institutionalization. Overly restrictive conditions of probation are frequently imposed.

The present system frequently fails to adequately achieve reintegration of the child into society or to attain his rehabilitation. In some cases non-court social or rehabilitative services would better meet the needs of the child than the court proceeding. A mentally retarded child, for example, generally needs specialized services, not a court. The neglected or dependent child may be advantageously helped by social services rather than probation. Currently, diverting such cases into these services is difficult prior to official court consideration. New York is one state which adopted an intake practice in juvenile courts to enable the court to authorize such

[47] 384 U.S. 436 (1966).

[48] 372 U.S. 335 (1963).

[49] Kent v. United States, 383 U.S. 541 (1966).

[50] See, *e.g.,* COLO. REV. STAT. § 22-8-6 (1963); CAL. WELFARE & INST'NS CODE § 507 (1966).

[51] See *e.g.,* N.Y. FAMILY CT. ACT, §§ 711, 712, 754, 756 (1963).

outside remedial measures before a petition is filed. That state also allows court surveillance of a case without filing a petition.[52] Such a practice enables the number of delinquency petitions to be decreased and yet achieves rehabilitation of the child. Moreover the court can focus attention on the more serious offenses.

In seeking rehabilitation of a child the present system does not enable the child to fully appreciate the correctional process. An indeterminate sentence may cause the juvenile to question the system and consider it as harrassing him — he may not understand its rehabilitative goals. The purpose of the continuing jurisdiction of the court during probation, of the parole authority, or of the correctional institution should be fully and carefully explained to the child. The jurisdiction should be subject to review at a given time to see if it is still necessary. The necessity for periodic review becomes more evident in light of the fact that a sequence of probation, institutionalization, and parole may extend over many years.

Probation poses other dilemmas such as the reasonableness of the conditions. It would seem that overly strict conditions which are unrelated to the offense charged would be so arbitrary and unreasonable as to violate due process. The present system fails either to recognize this problem or resolve it.

Moreover, if probation is revoked for violation of condition, several due process questions arise. Must the juvenile have a hearing on his probation revocation? Does he have a right to counsel? To appeal? Also, an equal protection problem may be present. Are the probationers being treated equally when probation is revoked summarily for violation of a probation condition, when the conditions imposed are neither uniform nor in conformity with any rational policy?

The current practice of providing a waiver proceeding allows the more severe juvenile crimes to be treated more strictly in the criminal courts and with the possibility of very severe penalty. Presently, the procedures surrounding the waiver hearing have come under criticism as being a denial of due process. The legislature or court, in allowing such a practice, seems to be protecting itself from public criticism in the more severe cases. "The community, in general not yet convinced of the value of the experiments [juvenile courts], is unwilling or unable to give up totally the satisfaction of punishing wrongdoers in exchange for the dubious advantage of rehabilitating them."[53] Increased substantive protections are needed before waiver should be allowed. And doesn't the waiver provision

[52] N. Y. FAMILY CT. ACT, §§ 713, 727, 759 (1963).

[53] Gordon & Sargent, *Waiver of Jurisdiction*, in 9 CRIME AND DELINQUENCY 121, 126 (1963).

represent our society's failure to provide adequate and effective juvenile rehabilitative facilities? If we programmed sufficiently for youth, we might eliminate the waiver procedure entirely.

The final criticism of the present system focuses on the transfer of the adjudicated delinquent from one institution to another. If he is transferred from a delinquency institution to the reformatory, he is being penalized in the same manner as the criminal offender. But the latter has been committed to the reformatory by a higher standard of proof than would occur in the usual juvenile hearing. Serious constitutional questions may arise. Typically a transfer is without a hearing or representation by counsel. It is an administrative act based on various considerations. Nonetheless, it would seem that the child should be allowed to have counsel, express himself and understand what is happening to him.

## III. Recommendations

In order to rectify and adjust the juvenile system to the legal standards which it avoids, many alterations are necessary. Probably a more significant one is to grant the juvenile court exclusive jurisdiction over cases involving minors. This change is needed to carry out the rehabilitative purpose of the juvenile court, and to avoid the arbitrariness of the current standard for waiver, *i.e.,* waiving jurisdiction depending on the age of the juvenile and severity of the offense charged. Concomitant with this alteration, the juvenile system will need better staffed institutions and more and better trained personnel. Then the staff could strive to rehabilitate the child and reintegrate him into society.

At the time of the delinquency petition, the child must be informed of his constitutional rights. These should include his right to counsel, to remain silent, and to a full hearing. Once counsel has been employed or appointed, interrogation and investigation of the child could go on within a fairer context.

Because the court may institutionalize the offender or may otherwise restrict his freedom, the authors feel that a uniform criterion for delinquency adjudication should be applied. This standard should be higher than that required in civil cases. A consistent standard would avoid certain inequalities which may now occur in juvenile courts.

After the adjudication of delinquency, the child and his parents should be notified in writing of the right to appeal and to counsel on appeal. If counsel has been provided throughout the proceeding, the parents and child will have the court's order and finding explained to them; they will understand its impact and ramifications.

Before sentence is rendered, the child, his parents, or counsel should have the right to examine a copy of the probation counselor's report prior to the disposition hearing. He can thus be in a position to contest it or question its accuracy. This would enable the court to know the facts more precisely. Moreover, the child should be allowed to challenge the conditions for probation if they are arbitrary or unreasonable. He has a right to have them given to him in writing and to have them explained to him. In this manner he can begin to "know himself" if he understands the purpose of the condition and why it was imposed.

The foregoing remarks apply with equal force to conditions of parole. There should be written conditions for the continuation of parole. Upon breach of a condition, parole or probation should be revoked only after a hearing at which the child is represented by counsel. Arbitrary revocation must be discontinued; the revocation hearing serves as a control on such activity. In addition to the above, the child should have been given written notice of the revocation hearing and its cause, and of his right to counsel. In short, the juvenile must have due process safeguards at any revocation proceeding.

The need for continuing jurisdiction of the court by use of probation must be reviewed by the court at periodic intervals. The probationer should be brought before the court and the parolee before the parole authority and if the need for probation or parole no longer exists, it should be removed. By the suggested review, the juveniles will be treated fairly, but the jurisdiction of the court or parole authority will last only as long as necessary — it will not be a means of harassment or of arbitrary punishment at the whim of an administrative official.

The principles underlying rules of probation or parole should be reasonableness, relatedness to the offense, and expectation of successful compliance. The child should be encouraged to comply with and benefit from the terms of probation or parole. He should not be confronted with conditions so unrelated as to be unreasonable or so harsh as to be impossible of compliance.

Changes must be implemented in the staff, facilities, and services of the juvenile court and the entire juvenile correctional system. As the constitutional standards are provided juveniles, and as evaluative research reflects the inadequacies of the services provided, more personnel will be required. These persons will require better training and orientation to the juvenile system.

An increased staff of social workers, skilled both in one-to-one and group counseling, as well as better intake practices will be required. Rather than coming before the court under a delinquency

petition, more juveniles should be channeled into the mental health clinic or other agency service which he may need more than the services of a court. The court, itself, as these other services become more available, may focus attention on the more serious offenders who come before it. In the interim, courts should experiment with shorter term probation for low risk cases.

Before a juvenile is transferred from a delinquency institution to a reformatory, a hearing before the Youth Authority should be held. Only in cases where the act committed by the youth, if done by an adult would be a crime or where the youth has committed a second offense which would be a crime, should transfer occur. Review by the court of the administrative determination should be afforded the juvenile.

Before the youth is transferred to a mental hospital or institution for the mentally retarded, a hearing must be held to ascertain whether the evidence warrants such action. Once the statutory mandates are met, the transfer would be proper. However, the child must be allowed to present evidence and litigate the transfer. The alleged facts must be subject to challenges of inaccuracy and of propriety of the action as to the individual being transferred. In such cases a qualified guardian *ad litem* may appear for the child to further clarify and represent the child's position, and to interpret the proceeding, the reasons for, and hopefully the merits of transfer to the child.

A. *Youth Authority*

Legislative policy determines whether the juvenile parole decision vests in the superintendent of the institution, a juvenile parole board, or a division of a Youth Authority. Despite problems inherent in each method, the authors recommend the Youth Authority model as offering the greatest opportunity for program and administrative efficiency and for consistency in the treatment of the delinquent throughout the institutional and parole phases.[54] Due process and good rehabilitative practice both require that the parole authority systematically review the eligibility of each institutionalized child for parole within a reasonable period of time following commitment. Such a system interposes a check on both the open-endedness of the indeterminate sentence and on the institutional personnel who would need to explain why the program has not successfully prepared a child for return to society.

The parole authority, which would be a division of the Youth Authority, should establish standards for the granting of parole. These standards for parole should be held out as a goal to each

[54] See, *e.g.*, CAL. WELFARE & INST'NS CODE §§ 1700-1803 (1966).

institutionalized child. It should be clear that parole after a defined institutional period is not a matter of right, but is a goal which can be attained by each child. Broad discretionary powers should remain with the parole authority, but standards would be beneficial to the child and to the authority in the exercise of its discretion.

If the child has retained counsel, the parole authority should grant the attorney the opportunity to participate fully in the parole hearing. Such a practice will permit a thorough discussion of all possible legal and sociological factors and enable the juvenile's case to be accurately presented. In the absence of private counsel, an attorney or guardian might be appointed. In either case the proceedings should be recorded. The opportunity to appeal to a court should be granted in instances of an alleged abuse of discretion by the parole authority or a contested fact issue.

B. *Waiver Procedures*

We should move to abolish waiver proceedings. A juvenile court should serve all delinquent children and not just those who are in their early teens or who have committed less serious offenses. The key to the elimination of this proceeding is the accelerated development of more extensive alternatives available to the court or provided by state juvenile authorities. Improved services to the sixteen and seventeen year old on both local and state levels would eliminate the need for waiver and carry out the duty of the juvenile court to provide rehabilitative care to all juveniles who commit delinquent acts.

If waiver is not repealed, its consideration should be limited to the sixteen and seventeen year old who commits a felony and for whom no suitable program is available through juvenile services.

## IV. IMPACT OF THE PROPOSAL ON THE PRESENT SYSTEM

The ramifications of incorporating the foregoing suggestions into the present system would be numerous. A major need would be massive educational efforts with specialists having contact with juveniles and with the public at large. To achieve full value from the proposed changes, the court, its staff, and the staff of related services, *e.g.*, the parole authority, must understand the aims underlying due process in the juvenile system.

High on the list of priorities would be the expanded training of judges holding juvenile jurisdiction. These judges require additional education in the legal and constitutional aspects of their specialized function, but legal training by itself is insufficient background. Graduate training and experience in social work, psychology, or sociology will be necessary for the most effective function-

ing by the juvenile judge. Since such combined formal training is rarely held by these judges, workshops and seminars to provide clinical orientation and sensitivity training are crucial. The National Council of Juvenile Court Judges has made an impressive start in this direction with its institute series which has reached more than 1,000 judges in recent years. Such workshops and seminars also place heavy emphasis on the legal aspects of juvenile court proceedings. State councils of juvenile judges are aiding the educational movement to secure justice for the child.

Police officers, especially those with specialized juvenile functions, will require related training in the legal issues connected with juveniles, particularly as it relates to their handling of a child. Similar training is crucial for juvenile probation and parole officers, and for those individuals who constitute the juvenile parole authorities in each state.

Law schools must expand their curriculum to include courses dealing with children and to include materials on the youthful offender and the law. Law students also need the practical experience of representing children who are respondents in juvenile court cases. Local, state, and the American Bar Associations should encourage participation by their members in juvenile proceedings and should sponsor seminars on the practice and philosophy of juvenile courts.

Legislative revisions are critical as part of the educational strategies to achieve justice for the child. Legislators and citizen groups concerned with children must take cognizance of these problems surrounding the delinquent child and seek statutory reforms to overcome them.

The state-wide juvenile correctional systems should be integrated into a single state-wide juvenile authority which can implement consistent administrative methods and checks to provide due process throughout the experience of the child in a state institution. Well trained professionals, knowledgeable in the legal as well as rehabilitation aspects of juvenile delinquency, must supervise the state institutions, youth camps, parole programs, and the transfer procedures between these state facilities.

Private attorneys will need to be appointed and paid from tax funds to facilitate legal protection to juvenile offenders in some communities. Increasingly, publicly employed legal counsel will be necessary to provide legal representation to the growing numbers of juveniles coming before the courts. Substantial amounts of time will be required from law guardians, juvenile defenders, and public and private agencies rendering legal services to the poor. Such counsel should be available daily in juvenile courts and should be

knowledgeable in law, legal procedures related to juveniles, and the goals of rehabilitation.

A state-wide public defender may be necessary on the state level to implement constitutional norms in appeals to higher courts. This official may also be the easiest means to incorporate those protections into parole granting and revocation hearings.

With more lawyers present in the pre-trial and adjudicative stages of the juvenile court proceeding, more appeals from these hearings can be expected. The appeals should be directed toward clarification of delinquency statutes or delinquency procedures. By the appeal, deficiencies in the rehabilitation practice and procedure may also be challenged.

Judicial reorganization in many states is essential to the proposal. Juvenile judges should be attorneys to be qualified to serve as judges. By this provision, the caliber of the bench will be improved commensurate with the improvement of attorneys appearing before it.

To achieve the desired reintegration of the child into society, considerable legislation and administrative changes will be necessary. The radical differences between institutionalized life and community life must be reduced. The institutionalized youth should relate to the communtiy through recreational and cultural activities, school and social activities, vocational training, and employment. Parental relationships should concurrently be improved through professional counseling and maintained by furlough visits.

## CONCLUSION

The juvenile court experiment, when it began in 1899, was never envisaged as being an instrument which would deny to the child the basic principles of fairness. A major purpose of the juvenile court was to provide a fair hearing with all of the protections due a child. Due process is one purpose of the juvenile court. This purpose has not been met.[55]

The juvenile court cannot continue in its present form and achieve its primary purpose.[56] Individualized justice for the child encompasses rehabilitation of the child and reintegration of the child into society. The present system, which shuns the adversary system and prefers flexible and informal deliberations, denies consistent legal protections to the child. As a result, the child does not under-

[55] See generally Quick, *Constitutional Rights in the Juvenile Court*, 12 How. L.J. 76 (1966).

[56] See Moylan, Sr., *Comments on the Juvenile Court*, 25 MD. L. REV. 310 (1965), which asserts that the early goals can be reached through a juvenile statute requiring procedural safeguards and due process for the child.

stand himself or the system. By incorporating constitutional safeguards into this system, individualized justice can become a reality.

Many problems arise in conjunction with these suggestions. Police officers will dislike consistently involving an alleged delinquent's parents in notice of arrest, presence during questioning, and clearer notification of legal rights, including the right to say nothing. Probation officers will complain that the child and his parents will not understand the legal rights explanation; they believe that the child simply wants to admit to the complaint and not be confused or delayed by interpretations of legal rights. Court clerks would prefer to sabotage the production and service of new forms. County commissioners would rather not spend greater public funds to provide for counsel for the indigent child. An overburdened juvenile court judge will not be happy with any substantial increase in the number of time-consuming contested matters.

By providing more lawyers in juvenile court, there will be more cases where the lawyer asserts his expertise developed in criminal courts. In some cases the lawyers may fail to consider that the child may prefer to admit to a wrongful act rather than undergo the anxiety of heavily argued and frequently continued motions and trials. A successful dismissal on a procedural technicality may accelerate a child's belief than he can continue a delinquent pattern and keep asking for a lawyer to beat future "raps."[57] Marginal income families may expend badly needed money for private legal services which bring the same result for their child as would have been obtained without counsel. This situation could cause deteriorations of the familial relationship and further rejection of the child.

Admittedly all of these problems may arise. However, they can be minimized through expanded law school course offerings on juvenile courts and delinquency. Practicing lawyers can be educated through orientation and seminars. More important, if the court and its staff as well as the state and community programs for juveniles improve and are successful in the context of newly offered legal protections, the result should be the maturation of the juvenile court and the juvenile correction system.

Benefits from expanded legal services to children brought before the court would be numerous.[58] More lawyers will become more interested in the goals and problems of the court and in court and community service needs. More legislative reforms affecting

---

[57] McLaughlin & McGee, *Juvenile Court Procedure*, 17 ALA. L. REV. 226 (1965).

[58] See Skoler & Tenney, Jr., *Attorney Representation in Juvenile Court*, 4 J. FAM. L. 77 (1954), for an analysis of the roles of counsel in juvenile court as reflected in the 1963 survey of juvenile court judges by the National Council of Juvenile Court Judges.

children's laws will be achieved; out-moded laws may be removed from the books and clarification of existing laws would be possible.

Appeals to higher courts will be facilitated. In this way current juvenile laws and procedures will be clarified, validated, or invalidated. Procedural fairness will be guaranteed the child at every stage of the proceeding from pre-trial to post-trial phases.

Juvenile court proceedings should be conducted to achieve the highest degree of child and parent participation in the process. Although formal courtroom hearings emphasizing the court's authority and control may be most effective with certain children selectively chosen for this type handling, usually greater success in the majority of the cases will be achieved in the informal chamber setting. The active involvement of the child and family in dialogue with judge and staff should facilitate rehabilitative goals. The less formal hearing seems more effective, in general, to the child's greater comprehension of himself and his decision to achieve rehabilitation.

Police handling and questioning of juveniles will need to be tailored to a new cloth. The *Miranda* precedent[59] would void many juvenile court cases if the issues determined by that case were raised in a typical juvenile delinquency matter. It is doubtful that the average policeman on the street makes a clear statement to the child as to his legal and constitutional rights before interrogating him. It is even more dubious whether a child has the legal status to waive his right to counsel and other rights without his parents being present at the time of the alleged waiver.

Police and the courts have relied upon the child's admission to the offense, especially with the numerous delinquencies which are unwitnessed. Defense attorneys, whetted by *Miranda,* will obtain suppressions of admissions and ultimate freedom for their child-client, even though the child may in fact have committed the delinquent act. To this degree due process may impede the purpose of the court to bring a child to accountability and to rehabilitate him. However, due process in this context can serve the heightened purpose of helping police officers and others who interrogate a child to effectuate higher standards of fair handling.[60]

Due process will mean more lawyers; more lawyers will mean more trials and more delays in dealing with the court docket; more lawyers will mean more private and public costs; more lawyers will mean more appeals; more lawyers will also mean more children

---

[59] Miranda v. Arizona, 384 U.S. 436 (1966).

[60] See Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WIS. L. REV. 7 (1965), for a recommendation that adversary procedures be introduced at the administrative level (screening by police and probation officers) with judicial supervision.

removed from detention to their homes pending trial; more lawyers will mean more "guilty" children found innocent because of insufficient evidence produced at a trial; more lawyers will mean an insistence on fair procedures at each step of the correctional system. Again, although inconvenience and an occasional "injustice" may occur because of this change, the gains should far outweigh the disadvantages, and the goals for the juvenile court should come closer toward achievement.

Due process as it is utilized more completely in revocation of probation proceedings will slow down and sometimes prevent a court's desire to banish a child to a state institution as quickly as it can. But here, as elsewhere, the child's growing recognition of his rights should help many children toward greater self assertion in their daily lives, and, in generalized form, toward more successful lives. This is one of the major purposes of the juvenile court system.

An increased number of hearings would also take place in the juvenile parole granting and revocation sequences. In many states this procedure is incompletely defined by statute, and personal hearings with the child have been discouraged or denied.[61] Due process, introduced to parole, would mean evidentiary consideration for granting or non-granting of parole and its suspension or revocation. Again, this will cause certain inconvenience and require more personnel, but the presence of due process should not impede, but in fact should strengthen the system of juvenile parole.

Transfers between state institutions would be slowed and more management problems could well be created if courts were required to approve transfers instead of the common present procedure of transfer by administrative decision. But sharply improved correctional institutions should reduce the need to transfer children between institutions when a child cannot now be handled in the original setting. For example, more disturbed children could be effectively handled in delinquency institutions without their transfer to a mental hospital.[62]

In summary, consistent due process in juvenile proceedings will cause inconvenience, will cost considerable money and will, in isolated cases, hamper the most effective consideration of the needs of a child. But the massive gains inherent in the application of this concept can only result in the greater fulfillment of the purpose of the juvenile court and its related agencies. A new model for the juvenile court should develop and with it the heightened implementation of all goals in behalf of children.

---

[61] The chairman of Colorado's Juvenile Parole Board, Mr. Goodrich Walton, told the writers in August, 1966, that no child has appeared directly before the Board during his six years as a member.

[62] See GLASER, REALITY THERAPY (1965).

# THE LAWYER'S CHANGING ROLE IN A RAPIDLY CHANGING SOCIETY

BY SIDNEY J. GOLMAN*

*Mr. Golman presents a thought-provoking discussion on the status of the attorney in personal injury and workmen's compensation cases. He presents a critical — and controversial — analysis of current society and its evolution. He next discusses the individual's personal injury from the viewpoint of society and of the victim. He admonishes the attorney in this field that his role both in and out of the courtroom must adapt to the demands of society and his client. He concludes by discussing the application of the rehabilative principles set forth and the means to achieve the fullest resortation of the client as an individual.*

THE practicing attorney in the field of personal injury and workmen's compensation, either as a representative of the plaintiff or defendant, has presented to him a challenging opportunity to be of greater and more rewarding service to his client. He can and must become involved in restoring his client to the highest potential of physical, socio-cultural, psychological, and economic attainment of which the client is capable.

To meet this challenge it is imperative that the attorney be willing to stand back and objectively reappraise his role in society as well as the role of those whom he represents and of those who oppose him. He must, I believe, come to recognize that there is a fundamental change, very much accelerated in the years since World War II, that demands of the practicing attorney a broadening of the scope of his duties and responsibilities. Being a good adversary is no longer enough.

Should the attorney be unwilling to recognize the need for the reappraisal and reorientation and persist to continue in the role of a hard adversary with his sole legal objective being that of obtaining for his client the highest possible monetary award (or in the case of the defendant the lowest possible money payment) without considering the dominance of other objectives to his client, he, together with those of the legal profession involved, will within the next quarter century be excluded from a practice in his chosen field. This result will occur not because the attorney is not needed, but rather that he has failed, as did the dinosaur, to accommodate to change in and requirements of the times.

---

*Member California Bar Association; L.L.B., Golden Gate College, 1953. His practice is specialized in the medical-legal field and in the management of restoration of the seriously injured arising out of third party and workmen's compensation cases within the United States and abroad.

What are the causes and conditions which would lead one to make such dire prophecy? Is there a solution which will permit the attorney to function in the liability and compensation field on a continuing basis where the value of his services to the client and society can continue to be justified? I, for one, think that there is a solution which will not merely continue to support the need for the attorney in the specialty field, but will enhance it.

In approaching the suggested solution to the attorney's new role, the reappraisal, re-evaluation, and reorientation can only occur if he is willing to accept the following hypotheses:

> That, while zoormorphic conception of man enables us to assign his place in the physical universe, the infinite dissimilarity between man in general and the individual in particular requires imperative recognition and equally imperative understanding of meaningful differences between individuals.
>
> That, in the evolution of man and sophistication of highly developed society, the individual plays an increasingly secondary role. His individual goals are persistently in conflict with those of the purpose of society as respects his duty to society and his responsibilities to himself and those immediately dependent upon him, as well as reciprocal rights arising in the relationship.
>
> That, because of this change in the duty and responsibility impressed upon the individual and his relationship to other individuals in the mass of society, the lawyer has been placed in the position where he must continue to justify his service to the individual whom he represents. He must extract for his client, in anachronistic values, as much from society as possible without recognition of the long term consequences of this action.
>
> That the lawyer, while apparently preserving the rights and duties of the individual, is in reality assisting in accelerating the emasculation of the individual by application of modalities and promotionary goals inconsistent with the objectives and direction of society. The lawyer has continued to maintain the strongly adversary tactics of the past in a society which is accelerating toward a goal of absolute responsibility of society to the individual, with the consequence that all individuals within the society shall be entitled, as a matter of right, to care, maintenance, and compensation without regard to historic legal liability of one individual to another.
>
> That the means by which political organizations of society can be inhibited from investing themselves through the administrations of the continued erosion of the individual is to accept the principle that the individual owes duties and reciprocal rights with respect to other individuals and social organizations that cannot be ignored. These duties can best be developed and administered without recourse to the judiciary, administrative bodies, or legislative enactments, with the consequent standardization of criteria for administration and consequent inapplicability to the needs of the individual, provided that, among the many concerned, the lawyer takes the lead in effectuating this self-administration of the rights and duties of individuals within the present framework of the law.

I would ask you to recall briefly the salient development of man and the role of the individual in society. Most of us, in our

educative process, have been exposed to courses in anthropology, history, philosophy, and the social sciences, but have in the press of life for existence neglected to be conscious of the meaning of what we have learned and, further, what is occurring at the very instant of our existence.

To demonstrate that which we have neglected to realize let us examine man in general and the individual in particular within the context of his environment and the history of his development. At the inception, man had only himself: his survival and his end were his own. Later followed the concept of family and the individual's obligation to it and thus the first impairment of total reliance and responsibility on oneself.

The evolution of the family into the community created greater interdependence and a diminishing need for security within oneself. Finally, but more slowly, man organized into broad developing geo-political units in which the individual had greater dependence on the social order. Individual anonymity was now possible. In this situation, he was either greater, the same, or lesser in status (whatever the values). In the early state organization, outside of common defense, the individual still retained considerable responsibility to provide for himself and his family while the community contributed little. If he was unfortunate, he made the best of his situation, and excepting charity, survived or failed on his own. Society's structure permitted and condoned this state of affairs.

With the industrial revolution came the growth of the importance of money as a symbol of exchange and a means of restitution and compensation for wrongs done to a person. The advent of the industrial revolution and the demand for more specialized work effort forced the individual to face the first real inroads upon his independence when he exchanged security for protection from misfortune. This exchange accompanied increasing transfers from one social stratum to another. Moreover, it came with the concurrent concern of the intellectuals for the impersonal exploitation of the workers; with the increasing urbanization and associated loss of opportunity to feed, clothe and house his family as he did when agrarian demand of society provided for at least a base existence. This process has but accelerated.

Even at this juncture in socio-cultural and economic revolution, considerable succor was provided by individual charity as well as by a growing body of welfare benefits provided by society. These latter were prolonged sufficiently to help the disadvantaged through a catastrophic situation, but withdrawn unceremoniously as it appeared the recipient was exploiting his disability. The individual facing a loss of social support was compelled to exercise what effort

he could to attain optimum activity and restoration. A work-oriented society was still unwilling to accept the philosophy that able people who did not or would not work were its responsibility in a total sense.

Toward the end of the industrial revolution and at the beginning of a rapidly changing technological society, values changed again. Values, mores, and ethics of the preceding culture which upheld the dignity of the individual and as well his responsibility for himself, were still those espoused in the transitional social organization, but were now corrupted in practice. The guilt of society was expressed in compassion and its desire to expiate for its past inequities. While expressing the need for the individual to be self-responsible, society commenced to provide security for all who, for whatever reason, found themselves at competitive disadvantage. Man, consequently, through his evolution, has lost contact with his heritage. His values which were changed slowly enough to be assimilated and which were considered constant are now changing so rapidly that he is confused as to the validity of his early indoctrination and present understanding of his place in society. He is accepting without recognition sets of values that subvert him as man.

Individual man now finds himself in the role in which he is constantly threatened as to his being needed. He is concerned about his job — the replacement of the type of skill which he has — what will happen to his status from external criteria and the consequent threat to his material comforts. The condition of the world, its conflicts, the threat of its people to him, war, and its total indiscriminate destruction create anxieties in him which become a part of his daily life and which he realizes he is unable to control. These threats, coupled with the loss of previously relatively constant values to which he could relate, make it no small wonder that when the opportunity presents itself to be materially protected from any one or more of the threats to his status, as it is or as he wants it to be, the individual will seize at the opportunity. In fact, it becomes more predictable that the person may seize dependency as the individual becomes more marginal or unrelated in his understanding of his relationship in the social organization. The motivational factor is now negatively oriented.

Dependency is now sanctioned and even promoted by society in its growing concern for the unfortunate, economically-socio-culturally disadvantaged, as well as the disabled person. Society aggressively provides the benefits to make continuation of the contracoup of its expressed purpose of restoration impossible. By the standards evident in administration of the welfare system, the individual does maintain some external semblance of dignity and self in the community. Society makes it a matter of right so that

he is not permitted to be ashamed; rather, he is told that he has dignity even though, in fact, he knows that he does not. He has become motivationally a drone and a parasite for he is relieved of all the obligations of life other than to maintain the inability or disability which society has led him to believe will support his existence at a level which he is willing to accept.

Where the physical injury or lack of ability to be competitive is in itself not sufficiently disabling to justify society's support, the psychological consequences supported by the physical, temporal, and spiritual standards of society, however arrived at, support the individual in social acceptance when he is able to involve emotional and contramotivational reaction within himself so as to produce the determinative factor which will gain society's support. This state of affairs feeds upon itself to solidify the state of disability and inability and often to increase it beyond all bounds of the actual incapacity.

The emotional reaction factors have for reason of convenience, time, and administrative facilities been assigned nomenclature such as conversion hysteria, anxiety neurosis, or depressive reaction, etc. These manifestations are rationalized psychiatrically as arising out of the injury or hopelessness of the social condition giving support to the inability to be realistic and adjusted to the loss of existing status, thus negating restorative motivation in the individual. Is it not that when the external symbols of compensation are adequate to meet the individual's standard that he will more likely seek the dependent state? Then, is it not reasonable to examine the role of the individual in our society and to conclude that a fortuitous event occurring in the form of physical injury or lowering of socio-cultural-economic status is not necessarily a tragedy but, on the other hand, is itself viewed by the individual as a benefit releasing him from further responsibility of competition in life, if only the degree of disability or inability occasioned by the injury or status can be sufficient to be accepted by society?

The individual finds himself in a situation where he is told that because of the fortuitous event he can expect to receive rewards that are meaningful to him. He is told that he can seek relief against the wrongdoing third party, which in quantum alone will compensate him for loss of income, for medical care and maintenance, and for the very subjective pain and suffering which he has had imposed upon him. These are all related to him in dollar amounts and the impression is left with him that the greater his real or simulated disability can be made, the larger his rewards will be. He is led to expect that, in addition to those rewards, he will receive assistance from the community, state and nation as the degree of disability

warrants. The criteria are set forth for these rewards which will relieve him wholly or in part from the necessity of competing in society — a desire which each of us has to varying degrees. He, then, can only draw the inference that if he does not meet the criteria, he will be forced back into the competitive and intolerable situation from which he had been trying to escape.

The individual who in varying degrees seeks, consciously or unconsciously, this state of being has been in an emotionally intolerable situation prior to the injury. Most probably as early as his childhood he saw himself as one in a disadvantaged socio-cultural situation. He expressed his anxieties in various forms such as rebellion, school dropout, and low level of attainment. His apparent ability to function was marginal. He did function externally because he had no legitimate excuse to himself, to his family, or to society which would permit him to withdraw from the competition in the situation intolerable to him. The excuse to withdraw comes with the injury, regardless of its severity, or it comes with the growing desire in the social welfare field to provide for the disadvantaged. His ego image is protected for, while professing to want to compete and to do those things expected of him competitively by society, he is now able to avoid them because of his "condition."

The cost to society and to each of us in promoting motivation of disability and inability is incalculable; not just in an economic sense, but in the fact that it deprives the entire social unit of the contributions that can be made by all within that social unit at every level of demand. This negative motivational force feeds upon itself in that it subverts and seduces the concept of the image of what man is and stimulates the withdrawal of the rewarded individual. And at the same time the negative motivation requires increasing output of the remaining sectors of society to continue to provide for the growing number who contribute nothing, yet who are capable of producing at varying levels.

This trend, so evident today, is imposing upon the entire society the obligation of meeting the demands of an increasing number of disabled and disadvantaged people claiming support. Meeting the obligation has become judicially and administratively overwhelming. Society is unable to individualize assistance and has fallen back on the formula of an arbitrary legislative and administrative criteria with consequent increased agency personnel and abrogated authority and power to meet the challenge. This complex organizational structure poses a threat to the continued existence of the lawyer as well as the individual client in his historic rights under the law for justice in adequate historical remedy.

The encroachment is now reaching the proportion wherein we

can expect that regardless of the infinite dissimilarities in the status of the individual he will be standardized as to his rights, obligations, and needs, but his rewards and remedies will be noncontestable. These standards will have little or no application to him as an individual. Whatever little dignity or difference individual man now has remaining, will be emasculated and the prophecy of George Orwell in his book *1984* will be realized in that all man will, with the exception of a chosen few, be left in the same status of a lesser animal. He will be fed, clothed, housed, and called upon to serve society as the select choose and will be granted these benefits only because his existence is necessary to the need of the select administrators and governors in whom he invested the power originally.

It is, indeed, a strange society which on one hand purports to be concerned about the individual, and on the other hand attempts to destroy him and his capacity for creative development and contribution within his abilities.

All this is not to say that we should not help man through his catastrophe; but, we should do it in such a manner as to make it rewarding for him to remain a man and be restored to a position where he needs to compete, to contribute, and develop within his capacities. Among those concerned with the preservation of the individual and his need for personal enhancements and contributory growth, the lawyer plays an important role and can make his contribution in providing the guidelines to motivation and the "acceptable substitute" which his client will willingly accept.

The attorney must play the role of the manager rather than the advocate in the initial approach to the problems presented by his client. I see it as his duty to first understand not alone the legal rights of his client and the obligation of others to him, but to understand his client as a psychological as well as physiological being. The attorney must attempt in the initial stages to develop the sociocultural picture of his client to include family background, family situation, environment, and culture as well as attempt to get an impression of the real goals and relationship of the client toward himself and society. In accomplishing this, his objective should not be to maximize the client's disability but rather to minimize it. The goal should always be how best can rehabilitation of the client in a total sense be accomplished even to the extent of returning the client to a status superior to that which he enjoyed prior to his physical injury though the result may be in a lower monetary award.

The attorney should at all times, in the management of his case, attempt to enlist the opposing counsel and opposing interest in resolving the apparent conflict engendered in the adversary situation and to accept the reality of the proposition that the interest of all

concerned is the common goal of restoration of the disabled, leaving the economic equity to be resolved by knowledgeable agreement arrived at during and after successful rehabilitation.

If the interest and cooperation of the opposing interest can be obtained, then the implementation of techniques toward the total rehabilitation goal should be programmed even though the end result will be to lessen the monetary damage to the client and consequent reduction of the counsel's fees.

The tools, techniques, and modalities available to the attorney are many: First, and most important, as previously discussed, is the client himself. If you have done your job well in understanding and evaluating your client, you will be able to manipulate him in such a manner as to produce a positive motivational force directing the client toward maximum physical, psychological, and socio-cultural restoration. Remember that only the client rehabilitates himself, but he requires direction, available technology, and astute manipulation to reach those goals.

Next, the attorney must start out with the consent of the client for flexible objectives and develop the program by utilization of medical restoration for the physiological problem and as well subtle and concurrent manipulation of the client in psychological motivation; these are concurrently involved, but must be utilized to avoid fragmentation of the client through compartmentalization of application of techniques. The utilization of the finest medical specialists who are oriented to the philosophy that, in addition to their technical capabilities, their most important function is to comprehend the goals of their patient and to show evidence of a willingness to subtly work with the claimant in obtaining these goals. The medical practitioner becomes a tool, albeit a very important one, in the successful programming of the rehabilitation process.

Concurrently with the medical restoration must be developed a program of realistic vocational goals for the individual wherever feasible. These must be related to his capabilities and to the remaining physical function and abilities he can demonstrate. The earliest possible acceptance and institution of the program in this direction is one of the imperatives and must be developed without hiatus usually found between those of physical and vocational rehabilitation programs. Available to the attorney is the service of competent counselors (before the selection of the counselor, the attorney should assure himself of the competence of the counsel and the acceptance by the counselor of the concert of objective and his function therein). There are both state and private agencies willing to provide these services and in many cases they are entirely without charge. Again,

while these services are utilized, the attorney must oversee and direct them in relation to the total program.

The attorney should next attempt to obtain for his client economic benefits available from state and federal agencies. But in obtaining them, he should never let his client forget that these are to be utilized only for the interim period between injury and ultimate restoration as a productive member of society; that they are merely to carry him through the catastrophe, and are not to be looked upon as permanent benefits which the client can transfer into a meaningful life oriented to the maintenance of inability and disability. The present levels of some of these tax-free benefits makes dependency most attractive to many people, and can be detrimental to the goal of independence and responsibility.

In third party liability cases of serious physical injury where there is likely to be a substantial period of temporary disability and long term and expensive medical treatment, the attorney should attempt to obtain from the more sophisticated insurers economic assistance with respect to medical bills and possibly even short term aid to compensate for wage loss. This can better be obtained, of course, when legal liability is clear than when it is in doubt. However, the severity of the injury itself makes the cooperation self-serving to the interest of the insurer.

Concurrent with the foregoing the attorney should carefully evaluate his case, as should the defendants, and attempt at an appropriate time to bring about a disposition of the case on an equitable basis. The attorney should not permit the case to drift along without resolution to the situation of trial, for in permitting that to occur the passage of time alone can only have an adverse effect on his client. The client in order to protect what he has, *i.e.,* his claim, must maintain as high a degree of disability as possible and the restorative effort undertaken is then wasted to a considerable degree.

I realize that this concept of total management and manipulation by the lawyer of his client in the direction of mitigation of injury has received approval in lip service from many areas of our society. However, as a practice, with some rare exceptions, this implementation of approach to the problem has been avoided. The reason for this avoidance, I believe, results from the historical development of the role of the attorney as an advocate and a contestant and from the unwillingness of all interests concerned to become involved in pioneering a concept with which they are not familiar.

Historically, the attorney is an advocate who pleads for his client in court attempting to maximize his client's injuries and minimize his ability to absorb the resulting damage, with the defendant, too, resorting to the court and to the jury to demonstrate that the

client is a fraud or is exaggerating his injury. The client in these situations has become a mere catalyst for the services of the lawyers, doctors and others involved in the prosecution and defense of the case in adversary proceedings.

What is proposed herein is not theoretical, but is demonstrated in over five hundred third party and workmen's compensation cases in which I have represented either the plaintiff or defendant. The result with respect to the individual has been astounding. With some rare exceptions, the injured party has become a whole human being with respect to his socio-cultural and economic restoration in the community, even though he remains substantially physically disabled. He has come to use his remaining abilities to their utmost, adjusted within tolerances psychologically and motivationally, and in many instances, far exceeded his preinjury goals in life. I am sure that many attorneys have, from their own experience and observations, seen what they consider amazing results with respect to the restoration of individuals. These, of course, have occurred rather infrequently and principally because the individual who suffered the injury was highly motivated, with developed skills, intelligence, and education or potential for education that were above average. Most of the clients with whom I have been involved are predominantly average or below average in the foregoing qualifications prior to injury. In undertaking leadership in manipulation of the motivational forces within the client toward total rehabilitation, you as the attorney will have done more in promoting the welfare of the client, of yourself and society, than will any other professional or nonprofessional group involved in the case. You sit in the position with respect to your client, more so than anyone else, to influence, control and manipulate his objectives toward that which is most beneficial in the long run to him and to society. He is looking to you as his total advisor.

The attorney can not absolve himself from the responsibility imposed upon him by the nature of his profession, as the temporal advisor of man, by permitting the ultimate decision as to how his client will be rewarded, to be decided by a judge or a jury, whenever, by his own efforts, he could have obtained the optimum restoration of his client with minimization of his disability, by meeting the real needs of his client, and by providing the client with greater benefits in worth than he would otherwise obtain.

In the management of the case you as the attorney will be required to become deeply involved with your client and with those who are called upon to serve him. You can never delegate this responsibility, but must at all times provide continued guidance for others necessarily involved with him and must exercise judgment

with respect to recommendations made by other professionals serving the client. You are the captain and will make the ultimate decisions with respect to the interest of your client and his treatment and management.

We have now had an opportunity to demonstrate these techniques and this practice in the United States, we have also had an opportunity to observe legal and medical practice in Europe, and in several countries subject to the Common Law and to explore the opportunity for application of the concepts expressed above. In most of the countries, the state through its Social Security System plays a much more active and larger role in liability and compensation than is found in the United States. The lawyer maintains rigidity with respect to his function, as he has done here, in that he is a total advocate and adversary. He does nothing to resolve the real need of the client as he is only concerned with the law. He is content that ultimately the judge or judge and jury will determine the rights and obligations of the parties. He does not attempt to influence the medical course of the case, nor does he involve himself with the motivational needs of his client nor in the restoration and rehabilitation of his client. He leaves that entirely to the doctors, para-medical groups, social workers, and the state. These groups, on the other hand, compartmentalize their attention and their services to the patient and do not involve themselves in what they consider to be the historical duties of the other services. There is little or no communication among the services rendered to the client.

The result has been that the real needs of the patient as a total human being have not been recognized or understood and have been ignored with respect to his treatment. His restoration to the optimum level of his capacity, considering that his motivational forces have not been awakened, has produced a longer period in the hospital and institutionalization with consequent deterioration in the person; a process so destructive that, when the legal decision as to his rights has finally been made, the individual for the most part grossly over-handicapped and, regardless of his award, is a detriment and negative factor to his family, community, and society in general.

Attempts to effect change in this historical pattern of dichotomy in function of services and in responsibility and involvement are coming to fruition both here and abroad. After fifteen years of effort to educate clients involved in the total management of liability or compensation cases including innumerable trips throughout the United States and overseas for conferences and speeches, we have progressed to a limited acceptance of the concept and its application within this country and are now on the threshold of its development in Europe where we have been asked to make a feasability study in

France and Switzerland on a number of cases in appropriate settings encountered in attempting to break down the historic traditions and relationships. But this is not an impossibility for we believe that the concerned interests will become aware by demonstration in scheduled cases that the result effected will be a benefit rather than a detriment to the client. It will mean, of course, that in accepting the concept of total management and its application, the lawyer as well as others involved must accept the destruction of the dichotomy of traditional roles and substitute that of interrelationship of ostensibly separated professions and services.

The obstacles have been considerable but I have found that the thinking man in the various professions involved, once he has found that there is no attempt to subject his integrity nor to deprive his client of meaningful awards, has been willing to permit the application of these modalities and techniques and has even gone so far as to permit me to undertake the direction and management of the case even though I am in a position of representing an adverse party with the real interest in common.

The success or failure of this program depends upon how well the attorney has achieved sophistication. He must be aware that the manipulation toward rehabilitative goals requires a highly individual and integrated service to his client. He must always evaluate those whom he chooses to assist in the program. These include medical, para-medical, sociological, vocational, and psychological personnel involved or likely to be involved in the care, treatment, and rehabilitation of the client. It is not sufficient that he undertake rehabilitation by sending an individual to a rehabilitation center and then permitting the ancillary services to take over. He must evaluate the quality of this service and understand that there are differences between and among the rehabilitation services available as to quality and motivation as there are between attorneys, doctors, or any other group professing a service and competing for clients.

Rehabilitation is popular and institutions and organizations purporting to provide medical, sociological, vocational, and psychiatric services have sprung up all over the United States. Nearly every larger hospital has its rehabilitation wing. For the most part this amounts to physiotherapy, muscle evaluation, vocational evaluation, and other gimmicks involved in physical restoration. In a serious case, for the most part these services are worthless. In addition there are physical rehabilitation centers associated with teaching institutions and while the quality of their service is superior to those in the general hospital they are primarily teaching oriented and the severely injured client is likely to become a clinical subject with consequent delayed restoration. There are rehabilitation hospitals

not associated with universities or general hospitals for the severely injured which specialize in types of injury or closely allied types of injury. In the main these are probably better facilities for our purpose of early restoration. However, in selection of this type of an institution one should not be as much concerned with the appearance of the plant or with slick catalogues and brochures as with the quality, dedication and involvement of personnel who are involved with the client. As a rule, the larger the institution the more likely the patient is treated not as an individual, but as just another patient who is being processed in a program that is not tailored to his particular need. There is a tendancy in the larger institution to pass the patient around among the various services and personnel with the medical director only periodically being involved with the patient. Under these circumstances the patient in fact becomes quite fragmented with respect to treatment and is seldom able to relate to an individual for a sufficiently long period of time to effectively deal with the real problems of his rehabilitation which are his psychological and motivational attitudes toward his injury. You will find that the techniques applied in all these institutions are essentially the same with respect to the technical aspects of his care, but great differences appear in the involvement of the staff, intimately, in the patient's problems.

There are both private and public rehabilitation organizations concerned with vocational rehabilitation. The Federal Government supervises a vast program concerned with vocational rehabilitation on a national scale in support of the various state agencies. Most are sub-agencies of the State Department of Education but there is a trend away from this and to separate departments. The expressed purpose of these is to provide vocational counselling, education and economic assistance for the client in attaining vocational goals.

Unfortunately most of these agencies are so involved in producing mass rehabilitation, in making studies of needs of further and expanded services, in developing statistics, and in other minor distractions that they avoid, with some exceptions and these exceptions depend upon the dedication and motivation of the individual counselor, great involvement with the very seriously injured and handicapped. Notwithstanding this tendency of avoidance in the difficult and serious case, the agency can be made to diligently and effectively direct its effort to provide successful vocational rehabilitation services to the client if the attorney stays involved and acts as an observer of the activity and a goal when the interest or the program of the agency seems to lag.

It is realized that what is proposed in this article has been sketchily outlined and each area only superficially explored. The

purpose of this paper was to bring to the attention of the legal profession and to other professional and non-professional groups concerned with the field of personal injury and workmen's compensation the need for a more enlightened understanding of the relationship of the injured.

To set out for consideration what I deem to be the goal of restoration of the individual to the highest level of independence and contribution, as the only valid and acceptable objective for all involved, as opposed to the validity of quantum of reward as the objective and to propose in attaining what I consider the only valid goal, that the attorney using modalities and techniques suggested here, adopt the role of the manager and become involved in the medical, cultural, socio-economic and spiritual problems presented in his client to attain maximum restoration.

In summary: There is a continuing and accelerated trend in society to designate the individual and to set standards and criteria for judgment for reasons of administrative convenience that do not recognize the dissimilarities among people. There is in the evaluation of the social organization an abrogation of the responsibility of the individual, with society taking over the responsibility of providing compensation for inability and disability with security and freedom from competition greater for most than could be earned in being returned to competition and required contribution of effort of the individual. There is a demonstrated solution to this unfavorable trend (of promoting inability and disability) in which the attorney can play a key role in motivation of his client.

# NOTES

## AID TO FAMILIES WITH DEPENDENT CHILDREN—A STUDY OF WELFARE ASSISTANCE

### INTRODUCTION

UNTIL the Depression in 1929, welfare assistance was within the domain of private organizations. Although a few local or statewide programs did exist,[1] they were exceptions to the general rule. The advent of the Depression focused attention on this private assistance and demonstrated its inadequacy. As the Depression continued, it became more and more clear that the needs of the people could no longer be met without coordinated help. In response to the continuing depressed character of the national economy, President Roosevelt, on June 8, 1934, promised legislation on the subject of social security. He said:

> Our task of reconstruction does not require the creation of new and strange values. It is rather the finding of the way once more to known, but to some degree forgotten, ideals and values. . . .
>
> Among our objectives I place the security of the men, women, and children of the Nation first.
>
> This security for the individual and for the family concerns itself primarily with three factors. People want decent homes to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes which cannot be wholly eliminated. . . .[2]

Subsequent to this statement, President Roosevelt, by executive order, created a committee whose task was to study the problems of economic deprivation and to propose legislation designed to alleviate and prevent similar conditions in the future. The President, endorsing the committee's recommendations for legislation, submitted the committee's report to Congress stating:

> The establishment of sound means toward a greater future economic security of the American people is dictated by a prudent consideration of the hazards involved in our national life. No one can guarantee this country against the dangers of future depressions but we can reduce these dangers. We can eliminate many of the factors that cause economic depressions, and we can provide the

[1] U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, *Foreword* to A CONSTRUCTIVE PUBLIC WELFARE PROGRAM at iii (1965).

[2] H.R. REP. No. 615, 74th Cong., 1st Sess. 2 (1935).

> means of mitigating their results. This plan for economic security is at once a measure of prevention and a method of alleviation.[3]

Thus it is clear that the Depression was the catalyst for a searching exploration of the economic ills of the nation; the result of this exploration was the Social Security Act of 1935.[4] This act was the first permanent legislation authorizing commitment of federal funds to states for public welfare programs.[5] It is interesting to note that the United States was the last major country to consider a comprehensive program of social security.[6]

In consideration of the act as enacted, a Senate Committee delineated the scope and purpose of the bill in the following way:

> The pressing need for social security legislation at this time is apparent on every hand. For the last 5 years we have been paying a frightful cost of insecurity in the toll of human suffering, weakened morale of our people, and mounting public expenditures for public charity. So far in the depression we have taken emergency steps, designed to relieve distress, and to take care of the immediate situation. The time has come for a comprehensive, constructive program to avoid the repetition of such a disaster in the future. The foundation for such a program is laid in this bill.[7]

In relating the broad impact of the Social Security Act to the welfare of children, a Senate Report stated:

> The heart of any program for social security must be the child. All parts of the Social Security Act are in a very real sense measures for the security of children. Unemployment compensation, for instance, will benefit many children in the homes of unemployed workers; and even old-age pensions and old-age benefits will in many cases indirectly aid children in families whose resources have been drained for the support of aged grandparents.
>
> In addition . . . there is great need for special safeguards for many underprivileged children. Children are in many respects the worst victims of the depression.[8]

Since its enactment in 1935, few years have passed without amendment or addition to the act.[9] In virtually every instance of revision, the scope of the original legislation has been enlarged or the provisions strengthened.[10]

The federal legislation was initially designed to encourage state adoption of active public relief programs. By offering states reimbursement for their welfare expenditures if the state program con-

---

[3] H.R. REP. No. 615, 74th Cong., 1st Sess. 3 (1935).

[4] Social Security Act of 1935, 49 Stat. 620 (1935), 42 U.S.C. § 301 (1964).

[5] *Foreword* to A CONSTRUCTIVE PUBLIC WELFARE PROGRAM, *op. cit. supra* note 1, at iii.

[6] H.R. REP. No. 615, 74th Cong., 1st Sess. 16 (1935).

[7] S. REP. No. 628, 74th Cong., 1st Sess. 2 (1935).

[8] S. REP. No. 628, 74th Cong., 1st Sess. 16 (1935).

[9] WELFARE ADMINISTRATION, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, IMPLEMENTATION OF THE 1962 PUBLIC WELFARE AMENDMENTS 1 (1964).

[10] BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUBLIC ASSISTANCE UNDER THE SOCIAL SECURITY ACT 1 (1966).

formed to federal guidelines, the states were strongly induced to begin a program of relief. In this regard, it should be noted that the federal statutes are, in effect, only permissive, insofar as any state is free to participate or not participate with the federal government in a given welfare program.

At the time of the conception of the act, nearly every state adopted a related welfare program. Today, "four out of every 100 American children depend upon the federally supported State programs of aid to families with dependent children . . . ."[11] These children are members of 1,102,449 families,[12] which encompass 3,465,554 children[13] and 1,129,711 adults who are either parents or guardians.[14] The federal expenditure totalled $161,474,677 in April of 1966,[15] an expenditure increase of 4.4% over the previous April. Relating these statistics to the state of Colorado, during the month of May 1966, this state was providing welfare aid to 12,418 families, which included 37,367 children and 11,102 parents or guardians, at a federal expense of $1,938,934.[16]

The preceding statistics demonstrate: (1) that the Aid to Families with Dependent Children program[17] encompasses a substantial part of the nation's population; and (2) that vast amounts of the nation's natural and developed wealth are committed to the support of these families and their children.

That persons needing a subsistence allowance do exist, and that without such aid such persons would be unable to provide themselves with the necessities of life, will be assumed throughout the course of this paper. In discussing AFDC, the response of the State of Colorado will be analyzed in terms of its goals and its fulfillment of specific requirements which result in receipt of matching funds from the federal government. Following this analysis, the operational effectiveness of the state program will be examined. During the

[11] BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, DEPENDENT CHILDREN AND THEIR FAMILIES 1 (1961).

[12] BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, Advance Release of Statistics on Public Assistance, April 1966, Table 1. It should be noted that these statistics indicate an increasing welfare burden because in 1961, only 910,000 families were receiving this aid. DEPENDENT CHILDREN AND THEIR FAMILIES, *op. cit. supra* note 11, at 2.

[13] Advance Release of Statistics on Public Assistance, April 1966, *op. cit. supra* note 12, Table 1. Here, too, an increase has occurred; 2,733,000 children received assistance in 1961. DEPENDENT CHILDREN AND THEIR FAMILIES, *op. cit. supra* note 11, at 2.

[14] Advance Release of Statistics on Public Assistance, April 1966, *op. cit. supra* note 12, Table 1.

[15] Advance Release of Statistics on Public Assistance, April 1966, *op. cit. supra* note 12, Table 2. This same release reported that one year earlier, in April of 1965, cost to the federal government was $154,713,449.

[16] *Id.* Table 7.

[17] Hereinafter, the Aid to Families with Dependent Children welfare program will be referred to as AFDC, even though Colorado still refers to its program as ADC. The federal designation is AFDC. 76 Stat. 185 (1962), 42 U.S.C. § 602 (1964).

foregoing study, suggestions as to how the program may be altered to re-integrate the welfare claimant into society, and thus lessen the long-range burden, will be discussed.

## I. THE STATE PLAN

The state plan, required by the federal law, is designed to provide services and to meet the needs of that state's needy families and their dependent children.[18] In the interest of uniformity and a comprehensive welfare program, a series of requirements must be met before the state qualifies for federal financial assistance. The Bureau of Family Services, a federal agency, is charged with approving or disapproving submitted state plans. It is therefore important that each state, Colorado in this instance, carefully prepare its plan.

In Colorado, a satisfactory state plan is largely the responsibility of the Colorado State Department of Public Welfare.[19] The DPW is charged with keeping abreast of current changes in federal legislation and revising their rules and regulations accordingly. When federal revisions require state legislative action, the DPW works closely with state legislative committees by making recommendations to the state legislature, which, when enacted, will assure continued federal assistance.[20] It can be seen that the DPW shoulders substantial responsibility for a smoothly functioning and continuous welfare program.

The duties of the DPW are several, and every duty has a basic relationship to federal law. The Social Security Act provides each state with an administrative option, *i.e.*, a state may establish a single state agency to administer the state plan, or it may establish a single state agency to supervise administration of the state plan.[21] Colorado has chosen the supervisory alternative.[22] Perhaps the most important duty delegated to the DPW is the promulgation of rules and regulations binding upon each Colorado county, which are "necessary or desirable for carrying out the provisions"[23] of Colorado legislation,[24] which are in turn, essential to continued federal financial assistance.

In many instances, the federal requirements are met by direct legislative action. In other instances, these requirements are met

---

[18] 79 Stat. 423 (1965), 42 U.S.C. § 602 (Supp. I, 1965).

[19] Hereinafter, the Colorado State Department of Public Welfare will be referred to as the DPW.

[20] Interview With Mr. John H. Jones, Principal Public Assistance Consultant, Colorado State Department of Public Welfare, Denver, Colorado, Sept. 9, 1966.

[21] 49 Stat. 627 (1935), 42 U.S.C. § 602(a)(3).

[22] COLO. REV. STAT. § 22-11-2(1)(b) (1963). See generally 7 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 7015, pt. IV (B) at 19 (1963).

[23] COLO. REV. STAT. § 22-11-2(1)(c) (1963).

[24] COLO. REV. STAT. § 22-11-2(1)(e) (1963).

solely by the rules and regulations promulgated by the DPW. The latter situation prevails when federal law is revised and the Colorado legislature is not in session at the time. But, regardless of which procedure is used, the revisions must be incorporated into the state's welfare program and must be binding on all political subdivisions of the state in order that it remain eligible for federal assistance. In the event the DPW acts alone, it has the authority to make and enforce the required revisions of the state welfare program. At a later date, when the legislature is in session, it may or may not incorporate the revisions into statutory form.

Revisions in the state program are not always in response to federal amendments. They may be made on the state's initiative. An example is the situation where a welfare worker finds a current practice too outmoded or inadequate to provide needed assistance. Such a worker explains the problem to his supervisor who then presents it to his administrator. The administrator reports the suggested revision to a county-state liaison worker who conveys the information to the DPW. In the event the DPW considers the suggestion valid and worthy of incorporation into the welfare program, the suggestion is drafted into final form and submitted to the Department of Health, Education, and Welfare where it is studied and approved or disapproved by the Bureau of Family Services.[25]

Whether the revision originates at the federal, state, or operational level, it is still a change in the welfare program. As such, it must always be submitted for examination and judgment.[26] This technique of examination, which occurs on every revision, permits HEW[27] to maintain surveillance over every state welfare program by continual determination and re-determination of whether any particular state is entitled to federal aid.

## II. FEDERAL REQUIREMENTS: A STATE'S RESPONSE

In this section, attention shall be given to those federal requirements which are most important or most controversial. As each requirement is considered, Colorado's compliance with and operation under it will be examined. At the same time, an analysis of the effectiveness of the state operation will be made where appropriate.

[25] Interview With Mr. John H. Jones, Principal Public Assistance Consultant, Colorado State Department of Public Welfare, Denver, Colorado, Sept. 9, 1966.

[26] As might be expected, the method employed for reporting *all* revisions is a form (Form FS-553), accompanied by a final draft of the actual revision. Because revisions are so frequent, the amount of paperwork involved is tremendous. This results in somewhat of a bottleneck, causing the needed approval to be delayed in the average situation.

[27] Hereinafter, the United States Department of Health, Education, and Welfare will be referred to as HEW.

A. *Geographical Coverage*

An approved state plan must "provide that it shall be in effect in all political subdivisions of the state, and . . . be mandatory upon them . . . ."[28] By this requirement, it is intended that the whole geographical area of the state be provided with welfare assistance, rather than isolated portions thereof. Thus, provided that the state is totally served by such assistance, the political subdivision chosen by a given state, to administer the welfare, is discretionary with that state. In Colorado, the various counties have been charged with administering public welfare.

B. *State Financial Participation*

The federal government does not assume all expenses of every aspect of welfare aid, even though it is willing to provide very significant financial assistance. Thus it is that federal legislation calls for a plan of "financial participation by the State . . . ."[29]

The amount of financial assistance provided by the federal government depends in part on the particular program involved and the size of the state appropriation for that program. Because of these variables, even when a state's plan is fully approved, there is no predetermined amount of federal aid available.

C. *Opportunity for a Fair Hearing*

In recognition of the right of every individual to equal treatment under the laws, the state plan must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness . . . ."[30] The hearing is intended to prevent arbitrary denial of an application, or delay in its consideration, at the local level.

In Colorado, county departments of public welfare are required to report their decisions rendered upon each application for aid, to the DPW. In addition, the DPW may initiate a review of any county's decision on requested aid, without regard to an applicant's desire for appeal.[31] Following appeal to, or review by, the DPW, an applicant suffering an adverse decision can appeal to a state district court. Despite this provision for court review, in Denver

[28] 49 Stat. 627 (1935), 42 U.S.C. § 602(a)(1). Colorado compliance with this requirement found in COLO. REV. STAT. § 119-1-9 (1963).

[29] 49 Stat. 627 (1935), 42 U.S.C. § 602(a)(2). Colorado compliance with this requirement found in COLO. REV. STAT. § 119-1-16 (1963).

[30] 76 Stat. 185 (1962), 42 U.S.C. § 602(a)(4). Colorado compliance with this requirement found in COLO. REV. STAT. § 22-11-9(1) (1963).

[31] COLO. REV. STAT. § 22-11-9(1) (1963).

County no judicial appeal has occurred during the past ten years.[32] The lack of judicial appeal indicates with equal force, either a strong tendency on the part of the applicants to abide by the state agency's decision or a lack of funds with which to finance such an appeal.

Appeals from the local agency to the state agency are also infrequent. Those appeals which are made, generally concern aid to needy disabled persons where the factual issue is the extent or permanence of the disability. One reason for the lack of appeals may be the fact that few technical problems are involved in the application process. The primary factual determination in AFDC cases centers on the applicant's income or the return of the husband; in either case, the issue is not complex.[33] When appeal to the state agency is taken, it must satisfy recognized due process requirements. These include the appellant's right to present witnesses and to cross-examine the welfare department's witnesses. In addition, court-room rules of evidence are applicable.

D. *Employment Incentives*

Prior to 1962, federal law required all earnings of every member of the AFDC family to be taken into account when computing the assistance for the family. The normal AFDC grant for a given number of family members would be reduced by exactly the amount earned. This requirement was destructive of employment incentives insofar as the recipients could refrain from all gainful employment and still receive the same income at the first of each month. To make the situation even worse, in some instances, the recipient who decided to work despite this financial restriction would actually be less well off after working because of incurring the expense of such items as work clothes or transportation costs. In 1962, amendments to the Social Security Act altered this situation by providing that the state plan must account for income or resources of the children and their relatives, but the income determination must also include an accounting of "any expenses reasonably attributable to the earning of any such income . . . ."[34] This allowance proved to be a limited improvement.

Recently, another amendment further liberalized consideration of outside income, by providing that the state agency could disregard the earned income of each dependent child under the age of eighteen. The disregard of such earned income was limited to fifty dollars per

---

[32] Address by Mr. Frank A. Elzi, Legal Services Division, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966.

[33] Interview With Mr. Frank A. Elzi, Legal Services Division, Denver Department of Public Welfare, Denver, Colorado, Aug. 31, 1966.

[34] 79 Stat. 423 (1965), 42 U.S.C. § 602(a)(7) (Supp. I, 1965). Colorado compliance with this requirement found in COLO. REV. STAT. § 22-11-5 (1963).

month, per child, and never to exceed a total of $150 per month for all of the children in the family.[35] Colorado, apparently recognizing the value of encouraging employment incentives, allows each child in the AFDC family to earn up to sixty-five dollars per month and each adult within the grant an amount not to exceed twenty-five dollars per month.[36] To the extent that the additional Colorado allowance exceeds the federal allowance, it is not reimbursable by the federal government.

To appreciate more fully the benefits provided by these allowances, it should be noted that prior to 1965, a dependent child was not allowed any gainful employment, under penalty of reducing the amount of the AFDC grant. In some instances, the effect of this restriction was indirectly to force the teenager out of the home so that he could continue to work to receive money of his own without increasing the burdens on his siblings covered by the grant.[37] Allowing the AFDC child to earn his own way, or perhaps to save money for vocational or other education, as the amendments now allow, seems to foster a sense of responsibility in the child which was previously quashed. Moreover, the family unity is preserved, *i.e.,* premature separation is no longer necessary.

An anomaly is created by the above discussed revisions insofar as the dependent child is given a significantly larger allowance than his parent. The seriousness of this anomaly is open to question, but it should be noted that the primary emphasis of the AFDC program is the welfare of the child. This is not to say that the parent is considered a lost cause. Rather, such a policy recognizes that the child, being in a formative stage, will likely respond more readily to responsibility. It is also a recognition of the difficulty in deciding how large the adult allowance should be before one reaches the point at which the adult recipient is provided with a double income, *i.e.,* welfare assistance and outside income. If the adult allowance is too large, inclusion on welfare rolls becomes too desirable. If it is too small, employment incentives are destroyed. Although the current allowance may be too small, it is a means of attaining the desired emphasis on improving the standards of the child.

### E. *The Recipient's Right of Privacy*

The right to privacy refers to the confidential nature of the information provided by the applicant while seeking welfare assistance. To this end, the state plan must contain "safeguards which

[35] 79 Stat. 423 (1965), 42 U.S.C. § 602(a)(7) (Supp. I, 1965).

[36] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 5, 1966.

[37] *Ibid.*

restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children . . . ."[38] When invoked, this restriction prevents the use of welfare records for commercial, political or personal purposes.[39]

In providing this protection to Colorado applicants and recipients, the Colorado legislature has made violation of the statute a misdemeanor punishable by a fine of not more than $500 nor more than three months imprisonment, or both.[40]

F. *Right of Application*

Every person wishing to do so must be given the opportunity to apply for AFDC assistance and should the requested assistance be granted, it must be provided with reasonable promptness.[41] The rationale for providing this right is found in the following reference to the legislative history of the requirement:

> Shortage of funds in aid to dependent children has sometimes . . . resulted in a decision not to take more applications or to keep eligible families on waiting lists until enough recipients could be removed from the assistance rolls to make a place for them . . . . [T]his difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds.[42]

G. *Desertion and Abandonment: Notice*

Every state plan must provide for a method of notice to law-enforcement officials in every situation in which aid is given and a child included in the grant has been deserted or abandoned by a parent.[43] Although the statute, as worded, appears to include desertion by either mother or father or both, Committee Reports on the legislation seem to indicate otherwise:

> It has come to [the] . . . committee's attention that the number of children receiving aid because of the desertion of the *father* is increasing. The legal responsibility of a parent for the support of his minor children is . . . clearly established in the laws of every State.[44]

As if in reliance upon this legislative history, Colorado law restricts

---

[38] 76 Stat. 185 (1962), 42 U.S.C. § 602(a)(8). Colorado compliance with this requirement found in COLO. REV. STAT. § 22-11-16 (1963).

[39] Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706 (1946) (dictum).

[40] COLO. REV. STAT. § 22-11-16(4) (1963).

[41] 76 Stat. 185 (1962), 42 U.S.C. § 602(a)(9). Colorado compliance with this requirement found in COLO. REV. STAT. § 22-11-4(2) (1963).

[42] H.R. REP. NO. 1300, 81st Cong., 1st Sess. 48 (1949).

[43] 76 Stat. 185 (1962), 42 U.S.C. § 602(a)(10). Colorado compliance with this requirement found in 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.21 (1963).

[44] H.R. REP. NO. 1300, 81st Cong., 1st Sess. 48 (1949). (Emphasis added.)

prosecution for desertion to the father of a child, excluding the child's mother.[45] In application, Colorado's statute seems to indicate a recognition that it is the primary responsibility of the father, rather than the mother, to support their children.

From the viewpoint of the welfare agency, the Colorado statutory focus on the deserting father does not exclude the deserting mother from its concern. Rather, when the mother has deserted, the emphasis is shifted from securing financial support[46] to "providing appropriate casework services to assist applicants and recipients to work out problems of family relationships and marital difficulties . . . ."[47]

1. Desertion in Detail

In Colorado, desertion and abandonment are considered essentially the same offense and punishable as a felony. Intent to desert is an essential element of the prosecutor's burden of proof;[48] this is frequently proven by a showing that the father is continuously absent from the home and has taken other employment in a different geographical location.[49] From a technical standpoint, the DPW has promulgated a series of requirements, *all* of which must be met when applicable to the individual case, before desertion can exist. The following factors must be verified:

> [1.] The child of the deserting father is under the age of 16.
> [2.] A marriage, including prima facie common-law marriage,[50] has existed and the child is the issue of such marriage. . . .
> [3.] Unless the parents of the child are, or were, legally married, the paternity of the child must be legally established. . . .
> [4.] The father has left the home in which the child is receiving care, failing to provide for the child's support in that home or elsewhere.
> [5.] The circumstances of the absence are such that a reasonable conclusion would be that the father is voluntarily and willfully absent without apparent intent to return. . . .
> [6.] The absence has existed for a continuous period of 30 days or more, during which there has been complete lack of support of the child by the absent father. . . .
> [7.] The absence of the father is the primary reason for the need of the child for ADC.[51]

---

[45] COLO. REV. STAT. § 43-1-1 (1963).

[46] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.21 (1963).

[47] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.213 (1963).

[48] COLO. REV. STAT. § 43-1-1 (1963).

[49] Interview With Mr. Frank A. Elzi, Legal Services Division, Denver Department of Public Welfare, Denver, Colorado, Aug. 31, 1966.

[50] A common law marriage is quite easily established in Colorado. Both parties to the marriage contract must be legally free to marry; both parties must consent, intend and agree to the marriage, either expressly or by implication. When these elements are met, a valid legal marriage exists which can be terminated only by legal action. See COLO. REV. STAT. § 90-1-1 (1963) (requirement of consent); Smith v. People, 64 Colo. 290, 170 Pac. 959 (1918); Estate of Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26 (1907).

[51] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.211 (1963).

Upon proof of these factors, a finding of desertion is made. The next step is to attempt to locate the father. To this end, information concerning the father's desertion is to be employed by the various county departments in an attempt to locate him, "whether his whereabouts are known or believed to be unknown." The contact with the deserting father is for the purpose of determining his attitude concerning the family and the support of his child.[52] For the most part, location efforts are conducted either by a welfare worker or by an investigation unit.[53] This unit relies upon caseworker reports, family members, organized public or private agencies, social organizations, and correspondence with other counties and states.[54]

After it has been reasonably determined that a desertion has occurred,

> a main condition of eligibility for ADC is that the applicant (including new, reopened or reinstated cases) must sign a statement . . . that she is willing to sign a complaint against the deserting father, if requested to do so by the District Attorney. ADC is granted promptly if the applicant signs the form; it is not granted if the applicant refuses.[55]

In some situations this condition of eligibility places a substantial burden upon the applicant insofar as she has no particular desire to see the father of her child prosecuted for the felony of desertion. This required cooperation on the part of the applicant or recipient is intended to force the father, when found, to fulfill his support obligations when otherwise he probably would not.

The foregoing discussion clearly focuses upon the female applicant and the pursuit of the father. In the reverse situation, *i.e.,* where the father applies for AFDC assistance after desertion by the mother, the above condition of eligibility is somewhat modified by practical necessity. All that is really required of any applicant is that he or she cooperate with law enforcement authorities. Thus, when a father applies for AFDC, there is no legal reason for requiring cooperation, since Colorado has no provision for prosecuting a deserting mother. As a practical matter, this question arises rarely, since a father will apply for AFDC in the normal instance, only when he is incapacitated and his wife is absent.

2. Legal Aspects of Support Actions

It will be recalled that desertion, when proven, is a felony, punishable by imprisonment. The criminal complaint of desertion is usually reserved for those cases where the location of the missing

---

[52] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.212 (1966).

[53] Denver Dep't of Public Welfare, Administrative Order No. 23, 1962.

[54] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.212 (1966).

[55] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.214 (1963).

father is unknown, or is known but he is outside the jurisdiction of the state. When the father's location is known and he is within the state's jurisdiction, a civil non-support action is employed. The civil action is preferred whenever possible because this gives the defendant father a further opportunity to avoid incarceration, providing he makes the proper payments under court order. In this way, the state hopes to avoid the expenses attendant to imprisonment of the father.

The county welfare department is able to select which remedy to enforce by using the eligibility forms the applicant must sign. This selection is possible because Colorado regulations provide for the immediate and full payment of the AFDC grant to the applicant when she signs a form indicating that she will cooperate with officials who might decide to pursue the deserting father.[56] The grant is made without regard to whether or not the father will make support payments. At the same time, by means of a pay-over form, the applicant signs over to the county department her rights to any support payments which might be forthcoming from the father. This DPW regulation serves a dual purpose. When the applicant relinquishes her right to the support money from the father, the county welfare department replaces the applicant as the real party in interest for the recovery of support payments. As such, the welfare agency can institute an action for support in its own name. The nature of the civil action will depend upon whether or not there has been a divorce. If there has been a divorce or legal separation which resulted in a court support order, the welfare department will enter the district court and move to have the order enforced and the department named as recipient. If there has been no divorce or legal separation and therefore no court support order, the welfare department will initiate an action in Juvenile Court against the defendant father for having contributed to the dependency of a minor, again with the department named as recipients of any payments.[57] These civil suits, because of the legal expenses involved, would likely go uninitiated by the spouse but for the resources of the welfare department, especially since the Denver Legal Aid Society, as a general policy, refrains from litigating divorce or delinquency actions.

The second purpose of this regulation is that federal requirements are immediately satisfied, allowing full payment of the AFDC assistance money to the applicant with federal participation. In the absence of fulfilling the federal requirement, the assistance could still be given to the applicant, but the funds would have to come from the General Assistance category, a category which is solely the

[56] *Ibid.*

[57] Address by Mr. Frank A. Elzi, Legal Services Division, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966.

province of the county and therefore not reimbursable by the federal government.

Aside from purely financial considerations, the immediate payment prevents extended hardships on the applicant which would be the expected result if she were required to wait for court action and then, after successful legal recourse, still have to depend upon the usually infrequent and inadequate payments of the defendant father.[58]

3. Purpose of Support Actions[59]

As a practical matter, the type of action initiated is indicative of its purpose. The criminal desertion action is employed when punishment is the desired end. Such actions hopefully will deter others from attempting to escape their legal obligations. On the other hand, a civil action in Juvenile Court is designed to recover support payments. To this end, an average of seventy-five such cases per month are litigated with a resultant recovery of approximately $500,000 per year in Denver County.

4. Reciprocal Support Act

On occasion, the defendant father is absent from the county or state in which his dependent child resides. In this event, one of the first problems faced by the Legal Services Division of the welfare department will be the establishment of jurisdiction over the person of the father. To provide a remedy for this situation, all of the fifty states[60] have adopted reciprocal support legislation.[61] In Colorado, this act is applicable on both an interstate and intercounty basis[62] and is in addition to, rather than in place of, other remedies.[63] It is the responsibility of the district attorney to file an action under this act, either on his own initiative or at the direction of the court.[64] The county welfare department is charged with providing information to the district attorney's office as needed.

The Reciprocal Support Act is largely a response to the belief that delinquent support payments are a major contributing factor to the need for welfare assistance. But, because the act is universally in force and delinquent support payments remain a problem, it has been suggested that the act should be replaced or strengthened by

---

[58] *Ibid.*

[59] Interview With Mr. Frank A. Elzi, Legal Services Division, Denver Department of Public Welfare, Denver, Colorado, Aug. 31, 1966.

[60] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.215 (1966).

[61] *E.g.*, COLO. REV. STAT. §§ 43-2-1 to -16 (1963).

[62] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.215 (1966).

[63] COLO. REV. STAT. § 43-2-3 (1963).

[64] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.215 (1966).

federal legislation. One suggestion is to make it a felony to cross state lines while guilty of non-support. This would enlist the aid of federal agencies in the pursuit of these individuals. There is some merit to such a recommendation because some states are generally uncooperative in terms of providing information which could lead to the apprehension of deserting fathers.[65] However, those advocating federal legislation in this area seemingly overlook the fact that such legislation would not significantly increase arrest percentages since mere authorization of federal law enforcement agencies to search for and arrest fugitives from support actions does not mean a sudden increase in arrests because of existing manpower and budgetary limitations.[66] Assuming for the sake of argument that arrest percentages would increase as a result of federal legislation, nonetheless, a corresponding increase in actual support payments would not necessarily occur. The welfare agencies would still be confronted with the problem of getting the money from these men even though they are in custody.[67] Frequently, these men would rather go to jail for contempt of court than make support payments to their wives and children.[68] Also, many such men lack sufficient education and training which would enable them to support the families for which they are responsible. In short, these factors combine to suggest that federal legislation would result in no significant improvement over the current Uniform Reciprocal Support Act.

H. *Services Provided to Recipients*

All state plans must "provide a description of the services . . . which the State agency makes available to maintain and strengthen family life for children . . . ."[69] In response, the DPW has promulgated the following statement:

> Within the broad framework of the Federal Social Security Act and specific Colorado statutory legislation, the purpose of public welfare in Colorado is to promote the well-bing [*sic*] of the people of Colorado by providing public assistance and social services to needy and distressed citizens. Such assistance and services shall be administered in such a way and manner as to encourage self-care, self-support, self-respect, economic and personal independence and

[65] A few states will not extradite a person, nor will they enter a court order under the act if an order is already outstanding in another state. A few other states are notorious for their refusal to return correspondence relating to the location of defendant fathers believed to be residing within their borders.

[66] Interview With Mr. Frank A. Elzi, Legal Services Division, Denver Department of Public Welfare, Denver, Colorado, Aug. 31, 1966.

[67] Address by Mr. Frank A. Elzi, Legal Services Division, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966.

[68] *Ibid.*

[69] 70 Stat. 849 (1956), 42 U.S.C. § 602(a)(12).

> the opportunity to participate in the life of the State as a good and useful citizen.[70]

This policy statement can be summarized in a single word: self-determination.

The emphasis on welfare services to families receiving AFDC assistance is the result of the 1962 amendments to the Social Security Act.[71] The existence of these amendments and a given state's acceptance of the obligations required to place them in operation are manifestations of growing concern over the deep-rooted causes of economic and educational deprivation. Prior to these amendments, welfare aid appeared to focus on financial assistance, rather than on services in the form of education or rehabilitation. Such a focus was unfortunate since money payments alone do little or nothing to combat the circumstances which initially place a family on welfare. However, financial assistance *and* services can play a vital role in the reconstruction of the lives of people receiving welfare.

Since a service-oriented AFDC program is an essential phase of an effective welfare plan, the term requires definition and the services offered merit detailed consideration. The DPW has defined services as,

> [T]hose activities of social work staff and related specialists, which are directed toward helping the individual client in one or more areas of functioning (i.e., economic, personal, family and social) for the purpose of achieving, to the extent possible, the objectives of strengthening family life, social rehabilitation, self-care, and economic independence for each individual or adult.[72]

Services which are available are divided into two subject areas, namely services to AFDC families and services to the "single person" categories such as Aid to the Blind or Aid to the Needy Disabled.[73] Services to AFDC families are further subdivided into five specialized areas: (1) Illegitimacy; (2) Parental desertion; (3) Potential for self-support; (4) Protection of children; and (5) Child medical problems.[74]

1. Unmarried Parents: Illegitimacy

Illegitimacy is not a particularly recent problem, but increasing emphasis on welfare programs has also increased public awareness and concern about AFDC grants to unwed mothers. Many people resent this use of tax dollars and this resentment has, in some states, resulted in legislative proposals requiring sterilization of the mother

---

[70] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4833.01 (1963). The actual services will be considered in detail. See notes 76-104 *infra* and accompanying text.

[71] 76 Stat. 185 (1962), 42 U.S.C. § 602(a) (Supp. I, 1965).

[72] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4800.01 (1963).

[73] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4810 (1966).

[74] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL §§ 4811.1-.5 (1966).

of illegitimate children before they can be eligible for AFDC,[75] or legislation which would simply exclude the second or subsequent illegitimate child from an AFDC grant.[76] These proposals appear to be morally obnoxious or constitutionally objectionable, or both, but the fact that such legislation has been seriously suggested seems to indicate a deep public concern over illegitimate children receiving welfare aid. Such concern is not misplaced, but it should not be exaggerated out of proportion to the welfare problem. For example, "over a 20-year period the increase in illegitimate births has been from about 4 to about 5 in each 100 live births."[77] These figures refer to the population at large rather than strictly to illegitimate births among AFDC recipients. In fact, "an estimated 21 percent *... of all illegitimate children in the Nation received assistance*" under the AFDC program in December of 1961.[78] Thus, the number of illegitimate children receiving welfare is significant, but the problem of illegitimacy is neither focused upon nor confined to the nation's public assistance programs.

The above statistics are not intended to suggest that there is no illegitimacy problem. In recognition of work to be done in this area, the DPW has provided for the evaluation of problems which relate to the legitimacy status of children, clarification of support status, counseling for the unmarried mother, and investigation of conditions which may lead to further illegitimacy.[79] The DPW has further provided that every county must provide services which aid in the planning of the future of both mother and child.[80] It may also provide optional services in the areas of prenatal and postnatal care, or in the "solution of environmental conditions seriously contributing to illegitimacy."[81] It is submitted that solution of environmental problems resulting in illegitimacy should be mandatory upon each county department, since elimination of conditons contributing to illegitimacy seems at least as important as providing medical care for a mother and her child after the child's illegitimate status is already an unpleasant fact.

In illegitimacy cases, the DPW is brought into contact with the father only to clarify support status. Thus, the father is not included

---

[75] BUREAU OF PUBLIC ASSISTANCE, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, ILLEGITIMACY AND ITS IMPACT ON THE AID TO DEPENDENT CHILDREN PROGRAM 51 (1960).

[76] ILLEGITIMACY AND ITS IMPACT ON THE AID TO DEPENDENT CHILDREN PROGRAM, *op. cit. supra* note 75, at 52.

[77] ILLEGITIMACY AND ITS IMPACT ON THE AID TO DEPENDENT CHILDREN PROGRAM, *op. cit. supra* note 75, at 2.

[78] BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, ILLEGITIMACY AND DEPENDENCY xxiv (Reprint 1963).

[79] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.11 (1963).

[80] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.12 (1963).

[81] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.13 (1963).

in the optional counseling which is sometimes available to the mother of the illegitimate child. To the extent that the father is equally as responsible for the illegitimate birth as is the mother, this appears to be a shortcoming of the services offered in this area.

Lest one believe that the new emphasis on services in the area of illegitimacy will lead to immediate improvement, it must be realized that the causes of illegitimacy are complexly interrelated in the country's social, economic and emotional structure.[82] The ultimate solution of these problems requires the extensive and long-term effort of private citizens, private welfare organizations, and public welfare agencies. The final solution, if ever attained, must be morally sound, constitutional, and directed at the causes of illegitimacy.

2. Desertion or Impending Desertion

A caseworker confronted with a family disrupted by desertion or impending desertion must evaluate problems concerned with repeated desertions indicating a desertion pattern. The caseworker must also give attention to reconciliation attempts, potential support from the absent parent, burdens on the remaining parent, and special effort directed toward keeping the family intact when it is the mother, rather than the father, who is absent from the home.[83] The caseworker may also serve as an intermediary between the feuding mother and father in hopes of preventing an impending desertion. Or, after desertion has occurred, the caseworker will aid in a more efficient management of the disrupted home.

The mandatory services which are to be provided by every Colorado county when appropriate, are to aid in seeking support from the absent parent and to alleviate the dual responsibilities of the remaining parent.[84] Each county, as limited by its resources, may provide services designed to effect a reconciliation with the deserting parent, solve the problems related to desertion patterns, provide general marriage counseling, and other services.[85]

3. Potential for Self-Support: Education

Ideally, every welfare agency is concerned with a family's potential for self-support. To evaluate this potential, services are provided which assess existing employment skills and opportunities.[86] Optionally, medical services may be secured "which will enable the recipient to engage in employment," training opportunities may be investi-

[82] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 3, 1966.

[83] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.21 (1963).

[84] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.22 (1963).

[85] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.23 (1963).

[86] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.32 (1963).

gated, and assistance may be provided to secure child care while a mother is working.[87]

In Denver County opportunity for training for useful employment exists in the form of Denver's Opportunity School. This school provides testing facilities designed to determine an applicant's aptitudes and also provides limited counseling services. The Denver Welfare Department makes every effort to encourage, since they cannot compel, AFDC recipients to make use of this service, but have experienced only limited success.[88]

Several reasons can be suggested which might explain this result. When a caseworker approaches an AFDC recipient about the advantages of Opportunity School, the subject of aptitude tests is always mentioned. The majority of recipients are frightened by the prospect of having to take a test, even though only an aptitude test. Therefore, their first reaction to further education is withdrawal from the subject. It has been suggested that a caseworker broaching this subject should never mention the word "test," but this solution is partial at best, since common knowledge always associates formal education with some form of examination.

A further explanation of the low proportion of recipients who take advantage of employment training is the presence of young, pre-school age children in the home requiring the constant care of the mother. For the welfare agency to provide care for these children while the mother is in school, and later while she is working, would create more problems than would be solved. Initially, in addition to the aid which would still be required during the training, child care must be provided. Later, when the mother begins to work, she is away from her children on a continuing basis and her absence may be detrimental to them. For these reasons, mothers with children needing regular care are not usually evaluated for potential self-support.[89]

The lack of education is, in many instances, self-perpetuating because those persons lacking education frequently are the ones who fail to appreciate its advantages. Under these circumstances, the serious welfare cycle, *i.e.,* generation after generation on welfare, comes into existence.

It is folly to underestimate the value of education. Many welfare recipients lack even a high school education. Such persons are

---

[87] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.33 (1963).

[88] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966. To illustrate, it is discouraging to note that there are more than 5,000 families receiving AFDC assistance in Denver County but only about 200 mothers have taken advantage of the training available at Opportunity School.

[89] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.31 (1963).

particularly vulnerable to overspending their income, to door-to-door salesmen, to loan-sharks, and to domestic problems. It is suggested that general education would make welfare recipients much less susceptible to these common occurrences, by teaching them the difference between a wise and foolish investment, and by teaching a husband and wife how to live together in at least semi-harmony. If education is potentially able to solve some of these very basic deficiencies, it becomes reasonable to ask why it is that education appears to be slighted in the typical AFDC grant.

It is true that Denver County has provided an apparently adequate rehabilitation program in the form of additional grants and allowances for education costs, but what value is the program if recipients cannot be "enticed" into it? Consider also the amount and allocation of an AFDC grant for four persons living in private housing in Denver, Colorado. Seventy-five dollars are allocated for food; sixteen dollars and thirteen cents for clothing; ten dollars and fifty-two cents for personal needs; thirteen dollars and twenty-eight cents for utilities; two dollars and twenty-five cents for household supplies; and *one dollar and fifty cents for education.*[90] This total amount must last this family one month. The only possible addition to this allowance is the expense of training for employment for the AFDC adult recipient.[91] Assuming that three of the four persons covered by this grant are children of school age, the above mentioned one dollar and fifty cents must cover the fees of attending public school, of buying pencils and paper, and of participating in various school activities. It is clear that this amount of money is pathetically inadequate. Almost as important is the fact that this sum of money will allow no newspaper or magazine into the AFDC home, these also being educational devices. This is not to say that there are no newspapers in the home or that school fees are not paid or school activities are not participated in. It is to say, however, that if these "luxuries" are indulged in, the money must come from other areas of the grant, *e.g.,* from the food allowance. But, the food allowance is already sorely taxed since that allowance is frequently invaded to pay the rent, for which an additional, and also inadequate, amount of sixty-one dollars and ninety cents is allocated for this family of four.

In fairness to existing welfare legislation, it must be pointed out that even though there is little money expressly set aside in the AFDC grant for education, there is still financial encouragement for education in the form of eligibility requirements. According to DPW

[90] Denver Public Welfare Department, *ADC Monetary Allowances* (1965) (insert). (Emphasis added.)

[91] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966.

regulations, children up to the age of sixteen are eligible for inclusion in the AFDC grant.[92] After attaining this age, the child can remain a part of the grant only as long as he is in

> regular attendance at a public or private school, high school, trade school, college or university, or under other special arrangements adapted to the child's educational needs, if such other arrangements lead to a diploma or certificate of vocational or technical training designed to fit him for gainful employment.[93] [Textual footnotes deleted.]

Private welfare agencies often provide financial assistance to potentially good students while they seek further education after graduation from high school.[94]

Emphasis in the preceding discussion has been placed on formal or organized education. Individualized training, *e.g.*, a caseworker tutoring in the recipient's home, is also possible. However, it is suggested that the expense of such a program would be prohibitive due to the number of persons who would be needed to make the program work. For the most part, education, to be practical, must come from existing facilities.

A final reason which might explain low Opportunity School enrollment is apathy. It has been stated that a vital phase of the AFDC program is the establishment of self-determination for each recipient.[95] This is a worthy endeavor and is certainly an essential aspect of any "services" program, but in the face of apathy, the mere availability of educational facilities may be for naught. On one occasion, an AFDC recipient was asked if she had ever thought of taking training and then seeking employment. The recipient's answer was, "Who me? Work?" The recipient then stated that she was "too nervous" to work.[96] This recipient may, in fact, have been too nervous to work. But this is not the point. What was illustrated was the recipient's lack of desire to overcome difficulties and to become self-sufficient. For her, it was seemingly easier to wait for the AFDC check at the beginning of each month than to become self-sufficient. Lack of motivation may explain this attitude and perhaps the caseworker's task is to motivate. To some extent this is true, but encouragement and persuasion are not always the only or a sufficient means of motivation. Legislation or regulations concerning eligibility may also

---

[92] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4233.1 (1965).

[93] *Ibid.*

[94] Address by Mr. D. Waddell, Community Services Consultant, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 4, 1966. The American Friends Service Committee is one such private organization.

[95] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 8, 1966.

[96] This information was obtained during a caseworker's home visit to an AFDC recipient. The author was an observer at this interview. Aug. 24, 1966.

motivate. To achieve maximum efficacy from the services presently offered, the pursuit of education and training should be made an AFDC eligibility requirement.

It should be noted that application for and receipt of AFDC assistance is voluntary, since the initial application for aid results from the payee's own initiative, *i.e.*, there is no state or federal law compelling application. Thus, to the extent that an applicant applies for aid, she must be prepared to submit to complete fulfillment of AFDC eligibility requirements. The voluntary nature of the initial application in effect gives the state and federal governments a license to make these requirements as stringent as appear to be necessary to meet the overall goals of an effective welfare program, including the goal of reducing the fundamental need of welfare at the outset. It would therefore seem, since standards already exist by which family members are evaluated on the basis of their potential for self-support,[97] that it could and should be provided that whenever a recipient is found capable of being trained for useful employment, and neither the training nor employment would adversely affect young children in the home, said recipient must agree to submit to education and training under "penalty" of being denied AFDC assistance. Should aid be denied because of the applicant's refusal to submit to education and training, the next concern centers upon the welfare of the children left in the home. In this context, there are two possible alternatives. The first and clearly most drastic alternative is to remove the children from their parent's custody by court order, although such procedure is usually considered an act of last resort. However, since welfare rolls are increasing and welfare cycles already exist, and these unpleasant facts are destined to become more serious with the passage of time unless parents are trained and educated to their basic responsibilities, perhaps drastic measures can be justified. The second alternative would be to continue welfare aid at the same level, but to subject the entire grant of money to absolute control by the welfare department. Under existing procedures, welfare funds are turned over to the recipients who then exercise their discretion with regard to how the money is to be spent. Under this suggested alternative, social workers would select and provide housing, and provide groceries and personal necessities, in all instances denying the recipient access to actual cash. Although this would minimize development of self-sufficiency in the recipient, it would serve to impress upon the recipient the advantages of training and education insofar as an agreement to further education would be "rewarded" by revesting control of the funds in the recipient.

---

[97] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.31 (1963).

Consideration of these alternatives, or others like them, seems merited in view of the fact that a lack of education tends to foster ridicule of the value of education. Further, in some instances, an uneducated parent might encourage illegitimacy so that daughters can receive AFDC assistance, or the same parent's conduct might illustrate hostility toward law enforcement officials and disrespect of the laws. In short, where a lack of parental education exerts a significantly harmful influence upon children under the care of such uneducated parents, it is submitted that the existing welfare program is inadequately equipped to cope with the resulting welfare cycle and therefore drastic revisions are justifiable.

4. Children Who Need Protection

In this service area, the caseworker must evaluate problems related to children: (1) in danger of physical abuse and neglect; (2) deprived because of continuing money mismanagement; (3) without adequate supervision; and (4) with parents incapable of functioning as adequate parents.[98] Each county must "assist parents to improve home conditions and assume responsibility for care and guidance of the children, including the management of financial resources."[99] Protective service cases may originate from a referral to the agency by a non-family person, a doctor who is required by law to report injuries he has treated which appear to have been inflicted intentionally,[100] or caseworkers observing mistreatment, lack of supervision or home mismanagement during a home visit.[101] Obvious signs of grossly inadequate child care include malnutrition, ragged clothing and filthy living conditions.[102]

Child neglect is most common in economically deprived families because the demands of meeting basic needs seem to overshadow proper child care. It is for this reason that protective services properly occupy an important place in the over-all services program.

5. Child Medical Problems

The final category of services focuses on children who have special medical problems such as illness, being handicapped, emotional instability, or generally poor physical condition.[103] In the solution of these problems, the county must assist "older teenagers

---

[98] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.41 (1963).

[99] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.42 (1963).

[100] COLO. REV. STAT. § 22-13-3 (1963); see generally 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4833.331 (1965).

[101] Address by Mrs. M. Snead, Intake Division, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 5, 1966.

[102] *Ibid.*

[103] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.51 (1963).

in evaluating their interests and potentials for self-support . . . ."[104]

I. *Services Plan for Each Child*

The concluding federal provision is the result of a 1962 amendment to the Social Security Act. It requires each state plan to develop and apply,

> a program for such welfare and related services for *each* child who received aid to families with dependent children as may be necessary in the light of the particular home conditions and other needs of such child . . . with a view toward providing welfare and related services which will best promote the welfare of such child and his family.[105]

The DPW, rather than the Colorado legislature, has reacted to this requirement by providing that:

> county departments are required to make a plan for every child in each ADC case and keep the plan up to date. In order to make a plan it is necessary that each child be considered in relation to his physical and emotional development and as to his home conditions. . . .
> The purpose of the individual consideration of each child is to determine whether problems exist . . . .[106]

Providing individual and extensive care for each child has a twofold effect. In addition to giving specific assistance to such child, this particular service "must always include help to parents to restore their capacity to care for children when that capacity has been weakened by long hardships."[107] Thus, evaluation of the problems of each child is indicative of the problems being faced by the parents of each child. The DPW recommends that the following areas be investigated and analyzed while formulating the required plan for each child: (1) the child's health; (2) the child's social behavior; (3) the child's attitude toward school and his performance in school; (4) the child's legal status, *e.g.,* establishment of legal paternity; (5) lack of physical care and protection; (6) lack of supervision, guidance and discipline; (7) exploitation of the child; and (8) the presence of degrading conditions such as alcoholism, promiscuity, or criminal activity.[108]

In order to facilitate an effective individual plan for each child, the DPW has promulgated several regulations designed to allow a greater time investment for each child. Effective on March 1, 1965, all AFDC cases in Colorado were declared to be service cases.[109] To be practical, this declaration required a caseload reduction. Under

---

[104] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4811.52 (1963).

[105] 76 Stat. 185 (1962), 42 U.S.C. § 602(a)(13). (Emphasis added.)

[106] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4235 (1964).

[107] BUREAU OF FAMILY SERVICES, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, SERVICES UNDER AFDC FOR CHILDREN WHO NEED PROTECTION 6 (1966).

[108] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4235.1 (1964).

[109] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4832.3 (1965).

the new regulations, no caseworker is allowed to have more than sixty service cases.[110] In addition to this, the supervisory load was altered so that no supervisor is in charge of more than five caseworkers,[111] for a maximum total of 300 service cases. Finally, this reduced caseload allows, and the DPW requires, a visit with the AFDC recipient every three months[112] rather than every six months as it was prior to the 1962 amendments to the Social Security Act.

The net result of this emphasis on service is increased contact between caseworker and recipient, which, in turn, makes the worker more familiar with the recipient's problems and allows the worker more time to expend more effort in the solution of the problems. Lest one believe that immediate and significant improvement is the dividend of this relatively new emphasis, it must be pointed out that patience is of the essence. The "services" amendments will undoubtedly lead to over-all improvement in the status of welfare recipients, but only in the long-run application of the program. It must be remembered that many recipients are "hard-core" and set in their ways. To provide services is, in a very real sense, to provide education, and the process of becoming educated, even at the practical level of home management and child care, is a slow one. But, if the needy are ever to become self-reliant, education, in every sense of the word, is the solution.

To financially expedite this services program, the federal government has made funds available which will reimburse the state and county funds to the extent of 75% of the *administrative* expenses of an approved state plan.[113] Administrative expenses, in this context, include the training of personnel and the payment of salaries of the additional number of caseworkers needed to put the services program into effect. This generous contribution from the federal treasury, although an extremely important factor in encouraging states to adopt a services program, in no way increases the amount of the AFDC grant given to a recipient.

## III. AFDC AT THE OPERATIONAL LEVEL

Having devoted extensive discussion to an examination of federal and state legislation and regulation, this Note will now explore the AFDC procedure from initial application to receipt of the AFDC grant.

The first step in this process is called the "intake" procedure. This phase is defined as "that period of time between the date of

---

[110] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4832.1 (1964).

[111] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4832.2 (1964).

[112] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4832.3 (1965).

[113] 76 Stat. 174, 180 (1962), 42 U.S.C. § 603(a)(3) (1964).

filing an application for public assistance and the date the county director approves the action taken to approve or deny the application . . . ."[114] The applicant is taken to a small cubicle for a ten to fifteen minute screening interview. Very basic information is solicited here, including a finding of the type of assistance being requested and whether or not the applicant has received assistance in the past.[115] At the close of this interview, a date is set for a second interview and the two or three days between these interviews is used to process the information gathered in the first interview. The second interview seeks detailed information about the applicant and constitutes a serious attempt to ascertain eligibility.

The child, to be included in the grant, must be living with an eligible relative.[116] Relatives designated as "grand" or "great" are eligible as AFDC payees, but "step-grand" relatives are ineligible. The county department has the responsibility for ascertaining this factor of eligibility and to this end, may examine birth certificates, church and school records, marriage records, court records, and others.[117]

The next determination concerns existing living arrangements. The child must live in the home of the applying AFDC payee on a permanent basis. Temporary absence of either the payee or the child will not affect eligibility.[118]

The AFDC payee must also have resided within the state of Colorado for one year prior to the date of application.[119] For the most part, however, only the residence of the child is important.[120]

A dependent child is one "who has been deprived of parental support or care . . . ."[121] This deprivation may be the result of the death of either parent, the continued absence from the home by either parent, physical or mental incapacity of either parent, or the unemployment of either parent.[122] Continued absence from the home may be due to desertion or abandonment,[123] incarceration, military service, and divorce or legal separation.[124] With regard to the

---

[114] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4810.1 (1966).

[115] The author was permitted to observe several of these interviews while they were being conducted. July 29, 1966.

[116] COLO. REV. STAT. § 22-11-4(c) (1963); 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4232.1 (1966).

[117] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4232.11 (1966).

[118] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4232.3 (1965).

[119] COLO. REV. STAT. § 22-11-4 (1963).

[120] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 4, 1966.

[121] COLO. REV. STAT. § 22-11-1(3) (1963); 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4230.011 (1966).

[122] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231 (1966).

[123] See notes 43-68 *supra* and accompanying text.

[124] 4 STATE DEP'T OF PUBLIC WELFARE, STAFF MANUAL § 4231.2 (1966).

divorce or legal separation circumstance, there is little of either in AFDC situations. This is because many attorneys shy away from these people as clients since their fees are hard to collect from the ex-husbands.[125] Whether or not a divorce has occurred is of small concern to the welfare department, since even without a divorce decree (and therefore no court order for support) the department can file an action in Juvenile Court charging the father with contributing to the dependency of a minor.[126]

Once it has been determined that a dependent child does in fact exist, an income evaluation must be made. Financial need is based upon the total value of the real and personal property possessed by the applicant and dependent children sought to be covered by the grant. An eligible parent or parents and one child can own realty up to a total value of $1000. The amount of $250 is allowed for each additional child up to a final maximum amount of $2000. Should net assets be under this amount, this factor of eligibility has been met. However, these restrictions exempt a home owned and used as a residence, necessary furniture and household equipment used in the home, and necessary wearing apparel.[127] Items which are not exempt include, for example, bank accounts, retirement funds, insurance policies and court judgments.

It is always the applicant's or recipient's legal responsibility to provide accurate and up-to-date information concerning all factors of eligibility, *e.g.,* changes in employment status. The burden of showing need, therefore, is upon the AFDC payee. The information provided by the applicant at the intake interview is checked by the welfare worker conducting the interview. Should any of the information be suspicious or prove to be false, the worker may refer the case to the county department's Investigation Unit which is charged with further investigation of the applicant's circumstances.[128]

Since the factors of eligibility are considered to be so important, the application form which the applicant is required to sign before becoming eligible for assistance, informs the applicant that if she provides eligibility information which is knowingly false and would entitle her to aid to which she would not otherwise be entitled, she will be liable for fraud.[129] This form must be signed before any assistance can be given so that a refusal by the applicant to sign makes welfare aid legally impossible.

---

[125] Lecture by Mr. Lauren F. Chamberlain, Training Officer, Denver Public Welfare Department Orientation Class for Welfare Workers, Aug. 5, 1966.

[126] See note 57 *supra* and accompanying text.

[127] Denver Department of Public Welfare, Policy Letter No. 12, 1959.

[128] Denver Department of Public Welfare, Policy Letter No. 23, 1962.

[129] Form PA-2, Department of Public Welfare, Application and Initial Determination of Eligibility — Family; see also COLO. REV. STAT. § 22-11-17 (1963).

In the event evidence exists which shows that a fraud has been perpetrated by an applicant or recipient, the case is referred to the Legal Services Division of the county welfare department. This division evaluates the evidence and forwards the information to the district attorney's office, which takes the case to court. In Denver County, there are an average of eight to ten cases of fraud per month and most of the defendants in these cases plead guilty.[130] As a practical matter, the fraud cases are prosecuted for their deterrent effect rather than as a punitive measure or for recovery purposes.[131] The reason for this is that from a punitive standpoint, a mother who has defrauded the welfare department will rarely be imprisoned because this would separate the family unit, creating a situation which the department seeks to avoid, not only because it is destructive of the family relationship, but also because it causes added expense in terms of care for the children. With regard to the possibility of recovery, the general economic and educational status of the AFDC recipient is not conducive to repayment of the defrauded funds.

It is the feeling of many people that the currently required complex eligibility factors are unnecessarily burdensome and time-consuming. That this may in fact be true is indicated by a 1963 nationwide survey which "revealed that less than 2 percent [of AFDC families] had apparently intentionally concealed or misrepresented facts in order to obtain assistance."[132] On the basis of this statistic, it would seem that fraud prosecutions are not really needed to deter fraudulent practices by AFDC recipients and that simplification of eligibility requirements would make administration of the AFDC program less expensive, and prosecutions unnecessary. It is submitted, however, that the statistic may be misleading or at least incomplete because there is no evaluation of the current deterrent effect of fraud prosecutions upon the low percentage figure.

## CONCLUSION

Public welfare is big business, costing this nation more than $5 billion annually. Of this investment, AFDC requires a substantial percentage. The factors of adverse psychological effect on welfare recipients, resulting from general economic deprivation, and the extent of this financial commitment, combine to demand a study of those phases of welfare which seek to reduce reliance upon welfare,

[130] Interview With Mr. Frank A. Elzi, Legal Services Division, Denver Department of Public Welfare, Denver, Colorado, Aug. 31, 1966.

[131] *Ibid.*

[132] U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, A CONSTRUCTIVE PUBLIC WELFARE PROGRAM 23 (1965).

rather than perpetrate it. In this context three outstanding areas lend themselves to prevention or elimination of welfare reliance.

The first such area concerns employment incentives. A more efficient welfare system benefits both the recipient and the general public. This is achieved in part whenever the recipients of welfare earn their own way as much as possible. From the standpoint of the recipient, employment is a measure of self-sufficiency, independence, and pride, resulting in a sense of responsibility which does not exist when one depends exclusively upon public funds for his personal needs. From the standpoint of the contributing public, employment for the recipient means decreased welfare expenditures at the same time the recipient begins making useful contributions to his society. For these related reasons, employment incentives are essential. The current welfare program, although recognizing the value of such incentives, has not yet provided adequate inducements. Only recently has it become possible for the recipient to seek employment without having his AFDC grant reduced proportionately. Even now, the only significant allowance for the adult is the amount of twenty-five dollars because that amount is presumed to cover working expenses. There is no doubt that determination of what amount can be earned without decreasing the size of the AFDC grant is a difficult decision. The situation where the allowance is too high, making it too advantageous to be on welfare and resulting in double income for the recipient, must be counterbalanced against the other extreme where the allowance is too low and no attempt will be made by the recipient to seek employment because it is impossible to have a net gain. There can be no question about either the value of employment incentives or the need for increased allowances. However, determination of the amount of increased allowances can only result from extensive investigation of the problems involved and goals sought in this area of welfare assistance.

Another area which perpetrates reliance on welfare is the physical separation of parents. This separation commonly manifests itself by the desertion of the father. When that occurs, two repercussions are frequently evident; first, the children left in the home are obviously without a father, and secondly, the father is fleeing from his legal obligation to support his children. Both effects are serious in their own way. Children without a father (or mother) are lacking an environmental circumstance which is important to a well-balanced childhood. The result of the absence may be over-reliance on the remaining parent, tendencies toward juvenile delinquency, or general antagonism toward any authority. A properly operating welfare department will provide counseling services designed to fill, in part,

the void left by the deserting parent. Such counseling is both time consuming and expensive. The county welfare departments in Colorado, to discourage desertion as a means of avoiding the support obligation, pursue the father and if or when he is caught, the departments can elect to prosecute him criminally for desertion, or can sue him civilly for support. A criminal prosecution is chosen if a decision is made that deterrence is the aim of the procedure. On the other hand, if it is determined that recovery from the deserting father is possible, the civil suit will be instituted. At the present time, it would seem that the welfare department's legal alternatives efficiently operate to deter support obligation avoidance.

The final area conducive to avoiding the welfare cycle concerns services to be provided welfare recipients. The broad service area includes a division which focuses on the problems surrounding illegitimacy. Currently there are no mandatory services designed to treat conditions which result in illegitimate births. Unless extensive effort is devoted to recognition of the causes of illegitimacy, this problem will persist.

The final area of services to be evaluated focuses on education. Education, or a lack thereof, is the primary problem of most welfare recipients who receive AFDC assistance. The education they lack is not necessarily detailed formal education, but is rather basic education which is essential to day by day existence, *e.g.,* which food is most nutritious, how to avoid over-spending a fixed income, basic child care and numerous other examples which a majority of people take for granted. Parents lacking such basic education frequently fail to appreciate the advantages of any kind of training or teaching and consequently, these same parents tend to pass their lack of appreciation onto their children. The result is a perpetuation of a hostility for education. The logical effect of this hostility is a continuing need for welfare assistance from generation to generation. Such continuing needs mean an ever expanding welfare program, which costs more and more tax dollars. In the current welfare program, education appears to be slighted, since barely more than one per cent of the AFDC grant is specifically allocated to meet education expenses. In addition to this financial deficiency, adults receiving AFDC funds can escape education with impunity because welfare departments can only "encourage" and cannot require that recipients partake of available educational facilities. As a result, very few recipients take either the time or trouble to learn what causes their problems and how their problems can be solved. Their problems remain unresolved, except to the extent that a welfare worker enters their lives and solves their problems for them. On the basis of this

state of affairs, it is submitted that education and training in the basic problem areas of their existence should be made mandatory by appropriate legislation. The essential nature of education cannot be understated; extensive effort can profitably be expended in the future in pursuit of this goal.

*Jerry E. McAdow*

# MEASURING THE CHILD'S BEST INTERESTS— A STUDY OF INCOMPLETE CONSIDERATIONS

## INTRODUCTION

THE problem of determining the custody of children presents the courts with the task of resolving complex social issues within a framework of legal rules and procedures. Today the governing legal principle in custody matters is that the best interests of the child will be the paramount consideration.[1] In theory this doctrine has great merit since the words "best interests of the child" seem to recognize the social aspect of child custody while providing a legal justification for the court's award, based upon the guidelines of a sound and equitable rule of law.

At the same time this rule has opened new channels of inquiry to the courts to aid them in weighing the intricate human factors that comprise a custody proceeding. The courts now often appoint investigators or social workers to analyze the various non-legal facets of a custody matter, accepting their reports and recommendations as evidence to aid them in arriving at a decision.[2]

In the final analysis, however, it is the judge himself who, in the exercise of his discretion,[3] must render his decision in the child's best interests. He must sift through the psychological test reports and the social worker's statistical data, maintaining an awareness of the human equities of the situation.[4] Then he must assimilate the evidence according to his own notions of what is really in the best interests of the child.

These notions reflect traditional assumptions of social behavior, yet from the standpoint of the behavioral sciences they are incomplete. An awareness of the sociological implications and ramifications of these conceptions might aid the judge, faced with the di-

---

[1] Oster, *Custody: A Study of Vague and Indefinite Standards,* 5 J. FAM. L. 21 (1965); Sayre, *Awarding Custody of Children,* 9 U. CHI. L. REV. 672 (1942). For cases in various jurisdictions see 24 AM. JUR. 2D *Divorce and Separation* § 783 (1966).

[2] Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943); Gluckstern v. Gluckstern, 2 App. Div. 2d 744, 153 N.Y.S.2d 184 (1956); West v. West, 208 S.C. 1, 36 S.E.2d 856 (1946).

[3] Usually the decision of the trial court will not be overruled unless there has been a clear abuse of discretion. Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949). See also Oster, *supra* note 1, at 23.

[4] One judge described the situation as follows:

> These contested child custody cases are never easy, and this case is no exception. From the nature of such disputes, involving as they do one of the basic instincts and great primal urges of human existence, whichever way judges rule is bound to leave a trail of heartache and pain. But decide them we must, for it is our job. . . .

Bowler v. Bowler, 355 Mich. 686, 694, 96 N.W.2d 129, 133 (1959).

lemma of a child custody determination, in the exercise of his discretion for the best interests of the child.

## I. Background of the Best Interests Rule

At early common law the courts based their decisions in custody matters primarily on the principle of the father's property right in the child.[5] The concept of a child as property vested in the father gave him an almost absolute custody right. Little attention was given to the interests of the mother, who as a married woman had relinquished her property rights to her husband. Likewise, the welfare of the child was not always considered. The father by virtue of his property right was considered the child's natural guardian and as such was entitled to custody. It was only upon proof of misconduct on the part of the father resulting in abuse of the child that the father's natural guardianship would not prevail.[6]

Gradually this strict doctrine favoring the father was modified by statute in England[7] and by case law and statute in the United States[8] toward a recognition of an equal right to custody in the mother. The traditional property right concept became replaced by more equitable considerations concerning the welfare of the child, resulting in the development of the best-interests-of-the-child rule.

The underlying principle of the rule is that no longer does either parent have a prima facie right to the child's custody. Henceforth, the court will exercise its discretion for the child's best interests.[9] The best interests rule seemed at the time to serve as a panacea for the delicate problems with which the courts had been faced of overcoming presumptions in favor of one parent or the other.[10]

The principle was codified in the United States in varying forms,[11] but always giving the courts a broad guideline for their determination of custody. Within the penumbra of the rule, the courts were forced to create various classifications of abstract terms indicative of the child's best interests to be used as criteria for the

---

[5] *Cf. Ex parte* Skinner, 9 Moore C.P. 278, 29 Rev. R. 710 (C.P. 1824); Rex v. Greenhill, 4 Ad. & E. 624, 111 Eng. Rep. 922 (K.B. 1836).

[6] *Re* Spence, 2 Ph. 247 (1847).

[7] Talfourd's Act, 1839, 2 & 3 Vict., c. 54; Guardianship of Infants Act, 1886, 49 & 50 Vict., c. 27.

[8] For a collection of American cases showing this shift toward recognition of the mother's right to custody, see *Ex parte* Badger, 286 Mo. 139, 226 S.W. 936 (1920).

[9] Oster, *supra* note 1, at 22.

[10] "For that matter, the law reviews and critical writers generally approve this test without exception and hail the high achievement of the courts in deciding this delicate question by such worthy principles. Courts and legal writers alike seem so pleased with themselves in hitting on the best-interests-of-the-child test, that they are both unable and unwilling to think of anything else."

Sayre, *supra* note 1, at 678.

[11] Oster, *supra* note 1, at 22.

adjudication of custody cases. Such measures as age and sex of the child, preference of the child, and fitness of the parent are examined in the cases for the purpose of determining the child's best interests.[12] These are the considerations announced by the courts which serve to reveal the underlying assumptions upon which custody is awarded in the exercise of discretion.

## II. CUSTODY BETWEEN PARENTS: THE UNDERLYING NOTIONS

### A. *Age of the Child: A Relative Concept*

Many jurisdictions will award custody of very young children to the mother.[13] In *Fitzpatrick v. Fitzpatrick,*[14] the husband sought to have the custody decree awarding the five-year-old daughter to the mother changed in his favor. The trial court granted custody to the father, but the appellate court reversed the decree, saying, "There is the natural right of the mother, who is not shown to be unfit, to nurture and care for her child of tender years, and ordinarily the child's best interests are served by her love, care and attention."[15] Little consideration was given to the fact that the husband had remarried, and that his new wife was always at home and willing to care for the child. The mother, on the other hand, was working at the time the divorce was granted and had worked ever since, hiring babysitters to care for the child. As to these facts, the court simply concluded that the husband's remarriage disclosed no change of conditions that would support a modification in the custody decree and that the child who was of kindergarten age would no longer need babysitters as much as before.[16]

While the child of five in the *Fitzpatrick* case was considered to be of "tender years," children of ten and twelve were not so classified in *Nicol v. Conlan,*[17] where custody was awarded to the father.

In some jurisdictions the preference of the child is given consideration by the courts, provided that he has reached a certain age. In *Hurly v. Hurly,*[18] the custody of two girls, aged eleven and thir-

---

[12] *Ibid.*

[13] Ross v. Ross, 89 Colo. 536, 541, 5 P.2d 246, 249 (1931):

> "Courts are disposed — properly so — to award to the mother . . . custody of very young children, especially girls, even where the mother's conduct has been such that, if the child were older its custody would have been placed elsewhere."

*Accord,* Leary v. Leary, 61 Ill. App. 2d 152, 209 N.E.2d 663 (1965); Payne v. Payne, 399 S.W.2d 619 (Mo. Ct. App. 1966).

[14] 207 N.E.2d 794 (Ohio Ct. App. 1965).

[15] *Id.* at 797.

[16] *Ibid.*

[17] 385 S.W.2d 779 (Ky. Ct. App. 1965).

[18] 411 P.2d 359 (Mont. 1966).

teen was awarded to the father. The court reasoned, "We cannot overlook the present ages of both; each child is at sufficient age to form an intelligent opinion as to custody."[19] The consideration of a child's age from the legal standpoint seems to serve a twofold purpose. It can be used to determine the parental needs of the child "of tender years" or it can serve as a measure of the merit in allowing the child to exercise his choice.

A sociological analysis of this issue discloses that any arbitrary age at which maturity is reached is impossible to calculate for all children. A young boy or girl may reach physical maturity at an early age ahead of his emotional experiences.[20] The critical time of puberty may not always conform to the chronological norms which the law imposes, and this conflict between legal requirements and actual conditions deserves recognition by the courts.

Under the age and sex tests used by the courts when applying the best interests rule, a teen-aged girl may be placed in the father's custody for reasons of preference or economy at an age when she needs a mother's understanding. One court has recognized the sociological problems involved in any arbitrary chronological age of legal maturity. In *Russell v. Russell*[21] the argument was raised that a child under the age of fourteen was "of tender years" because a statute declared that a child over fourteen could choose his own guardian. The court found the contention to be unsound, reasoning that:

> The Legislature has not declared that a child under the age of 14 years is to be treated by the courts as a child of tender years within the meaning of those terms as used in section 246 of the Civil Code. The sex is to be considered as is also the physical development. There cannot be any fixed and certain age of minority which, in all cases and for all purposes, can be said to constitute a child of "tender years."[22]

B. *Fitness of the Parent: The Notion of Motherhood*

The test to determine the fitness of the parent to have custody is most revealing of the underlying assumptions of the best interests rule. One criterion is, "which parent can best provide an atmosphere conducive to the child's healthy growth?"[23] In the case of *Gluckstern v. Gluckstern,*[24] the custody of a seven-year-old boy was awarded to the mother, despite the fact that, since she was a Christian Scientist, doubts were raised whether she would provide

---

[19] *Id.* at 361-62.

[20] SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 94-95 (4th ed. 1947).

[21] 20 Cal. App. 457, 129 Pac. 467 (1912).

[22] *Id.* at 461, 129 Pac. at 468.

[23] Oster, *supra* note 1, at 25.

[24] 17 Misc.2d 83, 158 N.Y.S.2d 504 (Sup. Ct.), *aff'd,* 165 N.Y.S.2d 432 (1st Dept.), *aff'd,* 4 N.Y.2d 699, 151 N.E.2d 897 (1958).

the child with proper medical care. The court reasoned that if custody of the child were awarded to his father, the child would be deprived of the adult companionship he needed, due to the father's absence from the home during his working hours. On the other hand, if the boy were given to his mother, "he would enjoy the companionship, care and *parental* guidance normally received by a child of his age."[25]

The court's assumption favoring the mother as being more fit to have custody of the child rested on its traditional concept of the motherhood role. The notion of motherhood is inextricably linked to any conception of the home, family, and child. Its natural attributes have been described as love, care, and nurture of the child.[26] As one legal writer has said, "The assumption is that woman, by nature or culture or through a combination of natural and cultural forces, is better suited than man for providing the care every child needs."[27]

Conversely, the notion of the father's traditional role in the family is equally as pervasive in the court's determination of parental fitness. This notion has been ably described by a sociologist and expert on family relations.

> The average father is lacking in appropriate "child-care" skills, because his socialization in the male role has (1) led him to deprecate such skills, (2) required him to have little practice in them, and (3) permitted him to hand the appropriate duties over to his wife. The role of husband and father, moreover, is defined particularly as breadwinner, and with few exceptions in our society this activity requires at least eight hours or so daily for at least five days weekly, at the times when children require most care.[28]

Society's concept of motherhood, which many courts employ in their application of the best interests rule, seems to create a presumption in favor of the mother that can only be overcome by a showing of unfitness which would place the mother at fault.[29]

It is difficult to describe with precision the positive attributes that constitute the court's notion of motherhood. The term is as undefinable as the best interests rule itself. Insight into the concept can be gained, however, by examining the negative attributes of motherhood, evidenced by a mother's behavior by which the courts deem her unfit to have custody.

In *Bunim v. Bunim*,[30] the wife was admittedly shown to have committed repeated adulteries with another married man. The court

---

[25] *Id.* at 85, 158 N.Y.S.2d at 507.

[26] Fitzpatrick v. Fitzpatrick, 207 N.E.2d 794 (Ohio Ct. App. 1965).

[27] Oster, *supra* note 1, at 26.

[28] GOODE, AFTER DIVORCE 312 (1956).

[29] Oster, *supra* note 1, at 29.

[30] 298 N.Y. 391, 83 N.E.2d 848 (1949).

found that such conduct was "repugnant to all normal concepts of sex, family, and marriage,"[31] and awarded custody to the father. While the court couched its reasoning in terms of "sex, family, and marriage," it seems clear that the wife's moral transgressions had contradicted its basic notion of motherhood.[32] It would seem to be inconsistent that a wife can be an adultress and a proper mother at the same time.

However, the wife's adulterous conduct does not always create a presumption against her in custody matters. In *Verdin v. Wade,*[33] a mother who was pregnant by her lover was successful in regaining custody of her two children after she subsequently married him. The court reasoned that her present "path of rectitude" was more important than her past misconduct in determining the question of custody.[34] The woman's moral misconduct may or may not conflict with the court's notion of motherhood, depending on the peculiar facts and mitigating circumstances of each case. It is submitted that in *Verdin,* the mother's marriage to her lover not only legitimized her child but also restored the image of motherhood and family which had been previously shaken by her adulterous conduct.

Alcohol and motherhood are as incompatible as drinking and driving in terms of a mother's fitness to have custody. The alcoholic mother finds difficulty in receiving custody of her children.[35] Her drinking seems to contradict the devotedness a court expects in a mother.

Since the notion of motherhood is so closely related to the concept of the home, the fact that a mother neglects her household duties may be a consideration in depriving her of custody.[36] Also, if the mother has voluntarily relinquished custody of her child by abandonment or agreement, custody is very often given to the father.[37] By her abandonment she seems to have contradicted the concept of motherhood and raised serious doubts as to her fitness

---

[31] *Id.* at 394, 83 N.E.2d at 849.

[32] For other cases where an adulterous mother has lost custody, see Grubaugh v. Grubaugh, 200 Cal. App. 2d 151, 19 Cal. Rptr. 141 (1962); Heater v. Heater, 254 Iowa 586, 118 N.W.2d 587 (1962); Shrout v. Shrout, 224 Ore. 521, 356 P.2d 935 (1960). In Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960), there was an inferred presumption that the mother was unfit to have custody if found guilty of adultery.

[33] 129 So.2d 571 (La. Ct. App. 1961).

[34] *Id.* at 573. *But see* Keer v. Cress, 194 Pa. Super. 529, 168 A.2d 788 (1961).

[35] Floyd v. Floyd, 218 Ga. 606, 129 S.E.2d 786 (1963); Lichtenberg v. Lichtenberg, 15 Wash. 2d 226, 130 P.2d 371 (1942).

[36] Howells v. Howells, 79 S.D. 480, 113 N.W.2d 533 (1962).

[37] Leach v. Leach, 179 Kan. 557, 296 P.2d 1078 (1956); Townsend v. Townsend, 358 S.W.2d 271 (Mo. Ct. App. 1962); *In re* Smith, 222 N.Y.S.2d 705 (Sup. Ct. 1961). In the cases involving parental agreement, it might be argued that the wife relinquished her right to custody solely because she could not otherwise have obtained the divorce from her husband. See Cantor, *The Right of Divorce,* The Atlantic Monthly, Nov. 1966, p. 70.

to be trusted with the child's custody. In *Ullman v. Ullman*,[38] the father had been awarded custody of his 2½-year-old child in a separation decree alleging abandonment by the wife. The court acknowledged that "the child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give,"[39] but found that in the light of her voluntary act of abandonment, "it would be a strange inconsistency should the court, after deciding that the mother had gone unjustifiably from her husband's house, visit upon him the penalty of the home broken by her fault and of losing his child. . . ."[40]

Some of these tests of parental fitness are closely allied with the traditional fault concept. In determining the fitness of the parent, the premise seems to be that the fit parent is the one who is not at fault. The woman who does not conform to the notion of motherhood is at fault and the assumption is that the father will better care for the child.

### C. *Modern Roles of the Mother*

A role analysis of the family members is a useful tool of sociologists in determining family relationships and attitudes. Motherhood is only one of the various sociological roles assumed by the wife in our society. The behavioral scientist recognizes the other emerging roles of companion and partner played by the modern American wife.[41]

The companion role depicts the wife as enjoying the privilege of being the object of romantic aspirations and having leisure time for social or educational activity. The duties of the companion role include the wife's cultivation of social contacts beneficial to the husband and the maintenance of intellectual alertness.

The partner role obliges the wife to contribute to the financial support of the family according to her earning ability and to maintain the status of the family by success in a career. The wife as partner enjoys the privilege of equal status with the husband, exemption from domestic duties to him, and financial independence.

While these two emerging roles may appear distinctly attributable to specific socio-economic groups, they in fact overlap and are commingled. One finds that a companion-wife in the upper middle class may often be working, an obligation peculiar to the partner

---

[38] 151 App. Div. 419, 135 N.Y. Supp. 1080 (1912).

[39] *Id.* at 424-25, 135 N.Y.Supp. at 1083.

[40] *Id.* at 421, 135 N.Y.Supp. at 1081.

[41] See generally BROOM & SELZNICK, SOCIOLOGY 369-72 (3d ed. 1963). A detailed description of several roles of the American wife is found in BOSKOFF, THE SOCIOLOGY OF URBAN REGIONS 157-59 (1962).

role.[42] However, her motivations for discharging this function of the partner role may in fact be toward the fulfillment of her role as companion, such as an attempt to overcome the boredom that can accompany leisure.[43] She may be economically motivated, not to maintain financial stability in the family, but to retain its upper class social status for the preservation and cultivation of advantageous social contacts of her husband.

The commingling of these two roles and their underlying motivations are as important for this discussion as the suggestion that both of these roles are distinguishable from, and represent a departure from the traditional motherhood role assumed by the courts. If equal consideration were given to these emerging roles of the modern wife and mother in our society, it might be discovered that the mother in a custody matter may no longer be confined to traditional household and child-rearing duties consistent with the notion of motherhood. Instead, she may very often be actively engaged in outside social activities within the upper middle class or may be working.

### D. *Motherhood and Family Unity: Practical Difficulties*

Assuming that the wife has fulfilled the court's notion of motherhood on the basis of her conduct prior to the custody award, the issue is raised whether she will in fact continue to fulfill this role as a single parent. An examination of this question rests on the concept of the organization of the family in our culture. Family unity is a desired goal in our society in which the role of motherhood plays a major part.

However, marriage does not automatically give rise to a family relationship as expected, but may in fact amount to no more than a means of legitimizing the child conceived out of wedlock.[44] Furthermore, the family in a custody matter is always a disunited family. Its structure as an organized unit has been dissolved by the divorce or separation decree. Kingsley Davis has described the plight of the child in such a disunited family:

> Having formed a union which is socially defined, which involves mutual rights and obligations, and which clearly has as its main function the rearing of children, the parents separate and thus deprive the child of its socially prescribed milieu. If he remains with one parent he lacks the other — a real loss, because each parent plays a necessary and complementary role in the child's life.[45]

---

[42] For a discussion on married women in the labor force, see MILLER & FORM, INDUSTRIAL SOCIOLOGY: THE SOCIOLOGY OF WORK ORGANIZATIONS 59-60 (2d ed. 1964).

[43] For a discussion on boredom as an attribute of the companion role, see BROOM & SELZNICK, *op. cit. supra* note 41, at 370.

[44] Goode, *Family Disorganization*, in CONTEMPORARY SOCIAL PROBLEMS 491 (2d ed. Merton & Nisbet ed. 1966).

[45] Davis, *Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1944).

An anthropological approach to the concept of family organization shows the shortcomings of any notion of family unity in American custody matters. The family structures of various cultures are divided into two basic types. The nuclear or conjugal family structure consists of the husband, wife, and children. The extended or consanguine family is made up of several blood relatives and their own conjugal units. The extended family consists of the clan, a wider concept of the kinship group.[46]

The structure of the modern American family is dominantly conjugal,[47] whereas the family in many non-Western cultures is of the extended type. Care and custody of children in an extended family relationship presents few problems, since the cultural values do not consider the immediate family as the sole or most important kinship unit, and the functions of child rearing are distributed from the outset. The child thinks of his family not as centering around his immediate parents, but as a joint household of various blood relatives. Therefore, if a divorce or separation occurs, the child's family unit is not really dissolved, since the remaining clan members continue to fulfill the duties of child raising.[48]

In the American conjugal family, however, divorce or separation of the parents means dissolution of the unit. As Kingsley Davis observes:

> With the principle of kinship substitution and the custom of the great household abandoned, the child of a . . . divorced parent has as a rule nowhere to turn except to the other parent. He does not retain the balanced family life that a child in a kinship society is likely to have. He is therefore a 'problem' in a much more pressing sense.[49]

Upon the dissolution of the nuclear family by divorce or separation, three responses of the remaining spouse may be manifested.[50] (1) *Reconstruction of the Basic Unit With a New Member.* The parent can remarry with the anticipation that her new spouse will legally adopt the children to restore the family to its original state or take on a lover who will fill part of the role of the missing parent but may not restore the family to a legitimized nuclear status. The remaining spouse may also find a surrogate parent for the child in the person of a relative or housekeeper. (2) *Reorganization of the Remaining Members By Assignment of New Roles Within the Structure.* The parent may reassign obligations performed by the absent spouse to herself and her children, such as delegating her

---

[46] See generally BROOM & SELZNICK, *op. cit. supra* note 41, at 355-56.

[47] *Ibid.*

[48] Davis, *supra* note 45, at 701.

[49] *Id.* at 705.

[50] See generally WINCH, THE MODERN FAMILY 721 (rev. ed. 1965).

usual household chores to her children and assuming a new role of provider herself. (3) *Dissolution of the Family Unit.* The parent may terminate the nuclear family by taking the children to live with grandparents.

When any of these three responses is manifested, any traditional notion of motherhood seems to be undermined, due to the practical difficulties with which the divorced custodian is faced. As Robert F. Drinan has stated, "It seems fair to say that American law has not thought out a consistent legal theory by which the once-married but emancipated, and now divorced, woman can fulfill all her duties to . . . the children over whom she has custody."[51]

In a few jurisdictions a tacit sociological analysis of the issues raised by these practical difficulties has afforded a basis for a change in the custody award. In *Thalassinos v. Thalassinos*[52] the wife who had been awarded custody was employed on a part-time basis and absent from her daughter for three days a week. She had employed several different maids to care for the child in her absence. The husband, on the other hand, had remarried and his new wife was not employed. The court, in awarding custody to the father concluded that the wife's absence from her daughter during working hours "deprives the child of the care, instruction, supervision and companionship of a parent which are not only desirable but essential to her well being and happiness."[53]

The mother in that case had attempted to assume the role of provider out of necessity and had delegated her motherhood role to a surrogate parent in the person of the various maids she had employed. The husband had reconstructed the basic family unit by remarrying. His second wife, who was not working, seems to have fulfilled the role of motherhood which would more fully serve the child's best interests.

The wife in *Wood v. Wood*[54] had taken her two children to live with another young mother and child. The two mothers, who were employed at different hours, shared the care of the children. The husband who had subsequently remarried, sought to have the custody award changed in his favor. The court found that the wife's arrangement for the care of her children was temporary at best, and concluded that she "had not been able to establish a home that gave assurance of continued adequate care and supervision."[55] Cus-

---

[51] Drinan, *The Rights of Children in Modern American Family Law,* 2 J. FAM. L. 101, 102 (1962).

[52] 77 N.Y.S.2d 311 (Sup. Ct. 1947), *aff'd,* 274 App. Div. 807, 81 N.Y.S.2d 155 (1948).

[53] *Id.* at 314.

[54] 207 Cal. App. 2d 33, 24 Cal. Rptr. 260 (1962).

[55] *Id.* at 36, 24 Cal. Rptr. at 262.

tody was awarded to the father, who "appears to have established a stable home and was prepared to provide adequate care, supervision and training for the children."[56]

These two cases represent an awareness on the part of the courts of the importance of a sociological inquiry into all of the circumstances involving parental roles and their relationship to the responses of the remaining spouse upon dissolution of the conjugal family.

In both cases the mothers, in order to meet the practical necessities of their situation as sole parent, had assumed roles opposed to the traditional notion of motherhood and more analagous to the fatherhood role. It is submitted that in cases where the mother must assume the role of father, which the courts have found is usually not in the best interests of the child, that she should not be entitled to custody under the traditional "motherhood" test. In such cases, the mother and father should be considered on an equal role status and other factors should be given consideration in determining custody.

## III. THE INCOMPLETE USE OF SOCIOLOGICAL CONSIDERATIONS: A CASE IN POINT

The situation that occurs when custody is to be determined between one natural parent and third parties presents somewhat different judicial considerations. One reason is that the cause of family dissolution may often have been involuntary rather than voluntary. Family disunity may have resulted from the death of one parent rather than divorce or judicial separation. A recent decision by the Supreme Court of Iowa in *Painter v. Bannister*[57] has aroused much public interest and controversy. Although the court in the *Bannister* case announces that its decision was in the best interests of the child,[58] the case is an exceptional one in terms of the assumptions used in its determination.

The issue which usually faces the court in these cases is whether to proceed on a premise of family unity from the standpoint of blood ties and parental rights or to regard the child as an entity apart from the nuclear family. The presumption of parental rights, stemming in part from old common law doctrines and in part from the natural notion of blood unity is difficult to overcome, unless the parent is shown to be unfit.[59]

---

[56] *Id.* at 37, 24 Cal. Rptr. at 262.

[57] 140 N.W.2d 152 (Iowa), *cert. denied*, 87 Sup. Ct. 317 (1966).

[58] *Id.* at 156.

[59] For a discussion of the parental right doctine, see 33 CALIF. L. REV. 306, 309-10 (1945).

*Painter v. Bannister* appears to be an attempt by the court to inquire into the role of the family as a socializing factor in the child's development. The traditional issue of parental right is not considered. Instead the court seems to assume as a sociological axiom the notion of family stability, and further to determine which social class is exemplary of family stability in the best interests of the child. It is for this reason that *Painter v. Bannister* merits discussion.

Mark Painter's mother died in an automobile accident in 1962 when he was three years old. His father asked Mark's maternal grandparents, the Bannisters, to care for the child temporarily. Two years later, after Mr. Painter had remarried, he asked the Bannisters for Mark's return, which they refused. An action was filed in the Iowa District Court to determine custody, which was granted to Mark's father. The Supreme Court of Iowa reversed the custody decree in favor of the Bannisters. The court found that the life Mark would be exposed to if custody was granted to his father would be "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."[60] On the other hand, the Bannister farm provided Mark "with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it."[61] The court concluded, "We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child."[62]

There were no issues of parental fitness[63] or parental right[64] deemed paramount in *Painter v. Bannister.* Rather, the court's determination rested on a choice between two different sociological environments, which it admittedly did not have a right to consider.[65]

If the child's best interests required a sociological examination of different environments, then an inquiry should have been made into the effects each might have on a child. Instead, the court considered the testimony of Dr. Hawks, a child psychologist, which concerned Mark's "father image" as now resting in Mr. Bannister rather than Mr. Painter. The testimony of Dr. Hawks is not to be entirely discounted here, but it does seem incomplete in terms of the sociological issue involved. Yet the court considered it as conclusive of Mark's best interests.[66]

---

[60] Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa), *cert. denied,* 87 Sup. Ct. 317 (1966).

[61] *Id.* at 154.

[62] *Id.* at 156.

[63] *Id.* at 154.

[64] *Id.* at 156.

[65] *Id.* at 154.

[66] *Id.* at 156-58.

The court's emphasis on security and stability in the home as opposed to intellectual stimulation seems to place an extremely high value on what might be called mediocrity as the desired ideal in a family relationship. The danger of such a notion has been ably pointed out:

> [I]t is of primary importance that the court should keep its eye on excellence, and seek to secure the very richest, finest life for the child, rather than fix its eye on mediocrity and feel that its duty is done when it has secured so-called normal home life.[67]

The court in *Painter v. Bannister* has determined a child's best interests on the basis of two assumptions of social behavior. First, by preferring stability in the home over intellectual stimulation, it would seem to assume that mediocrity in social activity is best for the individual. Secondly, the court concludes that middle class, middlewest rural society is the desired example of stability. Unfortunately, the court's notions find no basis in the facts of behavioral science. As eminent sociologists have stated:

> There would be little agreement, even among scholars, as to what constitutes . . . mediocrity, or debasement of culture. From a scientist's point of view there is too little precision in these conceptions to make them suitable for objective treatment. They fall within more speculative types of discourse.[68]

Elsewhere, they state:

> Nor does it (sociology) assume that the middle way is everywhere and always the right way: disparaging connotations of the word *mediocrity,* the condition of being intermediate between extremes, should be enough to ward us off that bland and simple-minded assumption.[69]

Not only is the assumption that mediocrity and stability are definable or attributable to a particular social class untenable from a sociological point of view, it is also in conflict with the constitutional rights of parents to raise their children, enunciated in *Pierce v. Society of Sisters.*[70] The Supreme Court in that case stated, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . ."[71]

The court's decision in *Painter v. Bannister* raises the question of whose best interests are really being inquired into, those of the child or those of society in terms of the kind of child it wants its

---

[67] Sayre, *Awarding Custody of Children,* 9 U. CHI. L. REV. 672, 683 (1942).

[68] Nisbet, *The Study of Social Problems,* in CONTEMPORARY SOCIAL PROBLEMS 2 (2d ed. Merton & Nisbet ed. 1966).

[69] Merton, *Social Problems and Sociological Theory,* in CONTEMPORARY SOCIAL PROBLEMS 791 (2d ed. Merton & Nisbet ed. 1966).

[70] 268 U.S. 510 (1925).

[71] *Id.* at 535.

families to produce. It seems that if such importance has been placed on the value of the family as a primary force in the child's socialization process that this question is better left to the family itself.

Also, it must be realized that the family is but one of the socializing elements in the child's development. Educational institutions, peer groups, and to an increased extent in our age of technology, television and other mass media all contribute to the social development of the child. Were Mark Painter to be raised in the Bohemian environment of the Painter household, could it not be argued that through the socializing agencies of mass media he would receive an adequate awareness of middle class mediocrity, at the same time he would be benefitting from his richer experience of intellectual stimulation?

## CONCLUSION

The best interests rule reflects an awareness on the part of the courts that the problem of child custody requires the examination of many non-legal issues. As one court has stated, "The difficulty of the custody problem lies not in the law, but in an analysis of the facts and in the application of the law."[72]

Due to the breadth of the best interests rule, the courts have been forced to employ various conceptual criteria such as age, sex and preference of the child, and parental fitness in their analysis of the facts. Traditional notions of motherhood, fatherhood and family unity permeate these considerations, serving as tacit assumptions of what is in the child's best interests.

A sociological examination of these conceptions demonstrates that as conclusive presumptions they are incomplete. The role of motherhood is an effective measure of the child's best interests only when it is considered in conjunction with other emerging roles of the modern wife.

Given the alternative responses with which the divorced or separated custodian is faced upon dissolution of the American family, a woman may be forced to shed her traditional role as mother in order to support her child. Under these circumstances the child in fact may or may not be deprived of the parental care he needs, and which the courts assume can only be provided by the traditional mother.

What is needed in the application of the best interests rule is a thorough acquaintance with the sociological tools available in custody matters. In a few cases this need has been recognized by the courts, suggesting a trend toward a greater awareness of the

[72] Hurly v. Hurly, 411 P.2d 359, 361 (Mont. 1966).

value of the behavioral sciences in the consideration of child custody disputes.

The final decision in a custody case still rests with the judge in his exercise of discretion for the child's best interests. The effective use of discretion in such matters requires an abandonment of the misconception that the traditional notion of motherhood alone is a conclusive test of the best interests of the child. Other considerations must enter into the analysis of the facts. Is the woman in a particular custody matter fulfilling the role of companion or partner? Can the mother, if awarded custody, continue to fulfill her role as a mother, or will she be forced by circumstance to assume a new role which may be inconsistent with the child's best interests? Has one of the parents remarried, thereby reconstructing a basic family unit which might provide a more beneficial atmosphere for the child?

By departing from traditional notions and addressing themselves to a broader sociological analysis of the issues in custody matters the courts will more fully serve both the best interests of the child and the interests of the society in which he lives.

*Timothy B. Walker*

# THE UNEMPLOYMENT COMPENSATION RECIPIENT — SHOULD HE ACCEPT A JOB?

## INTRODUCTION

EMPLOYMENT security acts, which exists in nearly every state, are designed to provide income to a worker who through no fault of his own, has lost his job.

The Colorado Employment Security Act,[1] originally enacted in 1935 as the Colorado Unemployment Act, is an example of how this end is accomplished. Under the act employers coming within its purview make contributions,[2] based on their employees' wages, into a state unemployment compensation fund.[3] Payments from this fund are paid by the Unemployment Compensation Commission to applicants who have filed the forms and have otherwise qualified.[4] These unemployment benefits serve the purpose of providing the claimant with income while he searches for new work. The overall program is aimed at returning the claimant to the active work force as soon as possible. To achieve this end, the claimant must comply with certain requirements to remain eligible for the payments. Thus, during his period of unemployment, he must be registered at one of the State Employment Offices maintained throughout the state by the Department of Employment Security,[5] be available for work, and conduct a thorough and active search for new employment.[6]

Another condition takes priority over the above requirements in importance to the worker: he cannot refuse an offer or referral of suitable work. A violation of this condition precipitates the discontinuance of the benefits.[7] The significance of this provision lies not only in the loss of the claimant's sole source of income but also in the vagueness of its terms. By studying factual problems arising under this condition and interpretations placed upon it, this uncertainty will be more apparent. Guidelines may then be suggested which would benefit not only the claimant in determining whether his action will breach the requirement, but also the agency that must determine if the condition has been breached. In light of this fact,

---

1 COLO. REV. STAT. § 82-1-1 to -13-6 (Supp. 1965).

2 COLO. REV. STAT. § 82-6-1 (1963).

3 COLO. REV. STAT. § 82-7-1 (1963).

4 COLO. REV. STAT. § 82-1-2 (1963); COLO. REV. STAT. § 82-4-7 (Supp. 1965).

5 COLO. REV. STAT. § 82-4-7(2) (1963); see also Reg. 7A of the Regulations of the Colorado Department of Employment Security.

6 COLO. REV. STAT. § 82-4-7(4), (8) (Supp. 1965).

7 COLO. REV. STAT. § 82-4-8(6)(c)(i) (Supp. 1965).

this note will be devoted to discussing both opinions and problems which have emerged from this requirement.

## I. OFFER OF WORK

In order for a claimant to disqualify himself from receiving benefits for failure to accept suitable work, he obviously must have first received an offer of work. Although the existence of an offer will usually be an easy factual question to resolve, certain situations may arise which cause some difficulty. Does general knowledge of job openings in a worker's occupational field constitute an offer if he feels he could qualify for the work? Is a help-wanted advertisement in a magazine or newspaper an offer of work in the statutory sense? Situations like these lack elements which usually attend an "offer of work" in common parlance.[8] Normally an offer is for a particular job and is directed at and communicated to the claimant personally. Furthermore the existence of an offer requires that the "offeror" anticipated an acceptance or rejection. Applying this test to the situations involving advertisements or general knowledge of job opportunities, it would seem that they should not be considered an offer of work. However, if the worker who possesses a unique skill in an occupational field which can be used by few employers, refuses to investigate a job offer in an advertisement made by one of those employers, he may, by the very nature of the work and limited number of potential employers have had an offer of work within the meaning of the statute. Courts have had occasion to apply the above standards. Thus, a call from a claimant's employment service asking whether he is interested in sales work, to which the claimant answers in the negative, cannot be considered as an offer.[9] It lacks the specificity which inheres in an offer. Likewise, a statement by an employer to his former employees that they might be given jobs if they would file applications was not sufficiently definite to be an offer. Hence, the employees' failure to fill out applications was not a refusal to accept suitable work.[10]

## II. REJECTION OF WORK

Few problems arise with respect to whether an offer has been rejected. It would seem possible for a claimant to reject an offer

[8] Although advertisements and "want ads" in a magazine may not constitute an offer under the suitable work provision, it should be recognized that a claimant's failure to inquire about such offers may disqualify him from receiving further benefits on the ground that he is not actively seeking work under COLO. REV. STAT. § 82-4-7(8) (Supp. 1965).

[9] Jackson v. Review Bd. of Indiana Employment Security, 124 Ind. App. 648, 120 N.E.2d 413 (1954).

[10] Muncie Foundry Div. of Borg-Warner Corp. v. Review Bd. of Indiana Employment Security Division, 114 Ind. App. 475, 51 N.E.2d 891 (1943).

not only by express refusal but also by his conduct. Once a claimant has received what is considered a valid offer, he should be required to exercise a certain degree of diligence in accepting the offer. Thus, a claimant who receives an offer of work and accepts it two weeks later only to find the job filled, might properly be denied further unemployment benefits because he has "refused" work. This result would seem even more valid if the offer is for seasonal work and the position must be filled immediately.

The problem has arisen as to whether or not an offer has to be made before there can be a refusal. Despite the conceptual difficulty in the issue, it was presented to the court in *Loew's Inc. v. California Employment Stablization Comm'n.*[11] In that case nine motion picture studios had agreed with a casting corporation that the latter was to hire extras for the former. Extras were paid $10.50 per day when appearing in scenes using less than thirty persons and $5.50 per day when more than thirty persons were required. Separate telephones were used for hiring in each group, and extras were to call both numbers each day to apply for work. The claimants had both telephone numbers but called only the $10.50 number. They filed for benefits for the period of time during which no $10.50 work was available. However, during the same time period extras were needed for the lower salary work. The court held that their failure to call the second number when work was available was a refusal even though there had been no specific offer of such work.

## III. Suitability of Employment

Whether particular employment is "suitable" is one of the more perplexing questions presented by the statutory provision disqualifying a claimant who refuses that employment. To determine whether offered employment is suitable most state legislatures have supplied their administrative agencies with specific guidelines by which to determine the suitability of employment for its claimants. In Colorado, for example, it is provided that:

> In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing work in his customary occupation, and the distance of the available local work from his residence, shall be considered. Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
> (ii) If the position offered is vacant due directly to a strike, lockout, or other labor dispute.

[11] 76 Cal. App. 2d 231, 172 P.2d 938 (1946).

(iii) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.
(iv) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.[12]

Despite these enumerated guidelines, many situations have been presented which require resolution by court and agency decisions.

A. *Health, Safety and Morals*

This standard is an attempt to make the job fit the claimant rather than forcing the claimant to work at a job which would seriously affect his health, safety or morals; no individual should be required to accept employment which would be physically detrimental to his well-being . Thus, a woman lacking satisfactory transportation, who would not accept nightshift work in an undesirable neighborhood, was not disqualified from receiving further benefits. Her action was not a refusal of suitable employment.[13] An elderly woman suffering from neuritis refused a job offer which would have required her to work twelve consecutive hours on two of five working days. She was held by the referee not to have refused suitable employment because the job would have adversely affected her health.[14] In another case, the claimant was justified in refusing a spray paint job on the ground that he was allergic to paint.[15]

Generally, courts have taken a liberal view in determining whether employment will impair the health or safety of an individual.

However, whether or not emotional and mental health is encompassed by the health and safety exception to disqualification seems uncertain. In one case the referee seemed to suggest that emotional and mental health problems, as well as physical hazards, will be a sufficient basis for refusal. In that case, the claimant refused to return to a job in a department where she had been slurred or insulted and tripped or hit while going downstairs. Because the claimant had two previous experiences in the department which

---

12 COLO. REV. STAT. § 82-4-8(6)(c)(i)-(iv) (Supp. 1965).

13 Referee's Decision-847 (Colo. 1955) [hereinafter cited as RD]. The author has taken Colorado administrative decisions from the Commerce Clearing House Unemployment Insurance Reporter, Vol. IB. The citation system consists of two letters designating the appellate body which heard the case. Thus, RD means "Referee's Decision." The digits following the letters are the number of the case; all cases decided during any given year are numbered in consecutive order. The abbreviation, "Colo." has been inserted to remind the reader that Colorado law is being cited. The cases reported in the Unemployment Insurance Reporter are extracts rather than entire opinions. Many agency decisions cited by various writers are taken from the Unemployment Compensation Interpretation Service: Benefit Series. Since this service is not available to the author, no reference will be made to it.

14 RD-6382 (Colo. 1953).

15 Sledzianowski v. Unemployment Compensation Bd. of Review, 168 Pa. Super. 37, 76 A.2d 666 (1950).

were so upsetting as to interfere with her work and give her a nervous condition, the referee held that she should not be precluded from receiving benefits due to her refusal.[16]

Other cases have been more explicit in saying emotional or mental problems fall within the health exception. The Pennsylvania Superior Court held that a victim of St. Vitus' dance was justified in refusing a piece work job because it would make him too nervous,[17] and an Iowa court held that a person with tendencies toward nervousness was not required to accept a night job with mental patients.[18]

Despite the fact that the courts and agencies have been fairly liberal toward the claimant where his physical and mental well-being are concerned, the burden is on the claimant to prove that a potential job will adversely affect his health or safety. Evidence to accomplish this is usually prior experience or medical records. But the problem is treated differently where a claimant refuses a job without adequate proof of harm reasonably anticipated from a prospective job. In *Wolfgram v. Employment Security Agency,*[19] benefits were denied where the claimant refused to accept a job in a mine because work several years previously at a lower level of the mine had caused heat rash. In rendering its opinion the court said, "Where a claimant refuses an offered job because of a fear that such job would be detrimental to his health, without further investigation, or inquiry, he is deemed ineligible for benefits unless he first gives the offered job a fair trial."[20]

This manner of treating cases differently on the basis of whether prior experience or medical reports exist seems justified. Without such a qualification, the claimant might easily resort to a defense of refusing a job on some fictitious physical or mental condition which he could claim would be aggravated by his acceptance. However, this is not to say that if a claimant has no medical records or prior experience, his refusal should automatically be considered a violation of the suitable work provision. In such cases the reasons for refusing on a health basis should always be considered carefully.

One frequently litigated question is whether a claimant's religion should be taken into consideration in determining whether he has refused suitable employment. The situation arises where claimant

---

16 RD-2268 (Colo. 1949).

17 Dep't. of Labor and Industry v. Unemployment Compensation Bd. of Review, 159 Pa. Super. 571, 49 A.2d 259 (1946).

18 Forrest Park Sanitarium v. Miller, 233 Iowa 1325, 11 N.W.2d 583 (1943).

19 77 Idaho 298, 291 P.2d 279 (1955).

20 *Id.* at 300, 291 P.2d at 281 (1955); see also Broadway v. Bolar, 33 Ala. App. 57, 29 So. 2d 687 (1947) (claimant failed to investigate job); Claim of DiStefano, 277 App. Div. 823, 97 N.Y.S.2d 75 (1950) (failure to try out job).

refuses to accept a job because it will require him to work on a day which interferes with his religious beliefs. In 1963, the United States Supreme Court decided this question on constitutional grounds.[21] In holding that the South Carolina Employment Commission violated claimant's First Amendment rights under the Constitution by disallowing her claim, the Court said:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[22]

The majority of state high courts which have been confronted with that issue have held that refusal of work for religious reasons does not disqualify claimant from receiving benefits. In *In the Matter of Miller*,[23] the claimant was a member of the Seventh Day Adventist Church, which teaches that the sabbath is from sundown Friday until sundown Saturday during which time no work is to be performed. The North Carolina Supreme Court decided that work on Friday night was not suitable for her, and she should not be precluded from receiving benefits. Cases involving similar fact situations have reached the same result in both Michigan [24] and Ohio.[25]

In these religion cases, it must be determined that claimant's religious objection is made in good faith. Obviously, *ad hoc* adoption of religious beliefs should not justify refusing employment. It would seem that religious convictions previously professed might properly be considered to determine the propriety of the refusal. However, once it is determined that claimant has honest religious beliefs which would interfere with his acceptance of a proferred job, the belief must be respected.

B. *Prior Training and Experience*

This statutory provision requires that for a job to be suitable, it must be reasonably related to the qualifications of the applicant. The basic theory is that the claimant should not be required to accept a job which involves far less or a different type skill than he possesses.[26] The real problem involved here is how much less skill

---

[21] Sherbert v. Verner, 374 U.S. 398 (1963).

[22] *Id.* at 404.

[23] 243 N.C. 509, 91 S.E.2d 241 (1956).

[24] Swenson v. Michigan Employment Security Comm'n, 340 Mich. 430, 65 N.W.2d 709 (1954).

[25] Tary v. Bd. of Review, Bureau of Unemployment Compensation, 161 Ohio St. 251, 119 N.E.2d 56 (1954).

[26] Frequently, this factor is intimately related to the problems of lower wages, the length of unemployment and general prospects of the claimant's securing his customary work, and it will be discussed in context with these factors in Section (D) *infra*.

does a job require before a claimant will be allowed to reject the offer in that a claimant may properly be required to accept a job involving a level of skill which is inferior to that already attained by him. In a Colorado agency decision, the claimant held a doctorate in physics and had been last employed as a research assistant in the missile industry. She refused employment as a door-to-door salesman. The referee held that she had not refused suitable employment in light of her high educational background and lack of experience in the offered work.[27]

Court decisions support similar results. In *Pacific Mills v. Director of Division of Employment Security,*[28] the claimant had gone to business college and been trained for office work. She worked as a secretary for Pacific Mills until she was laid off. Later, she refused work in the shipping department; the work constituted stapling tags to pieces of cloth and recording yardage on an adding machine. Despite the fact that the wages for the two jobs were about equal, claimant was held not to have refused suitable work. In a Minnesota case, the court determined that the claimant did not refuse suitable employment where he had been trained as a steam cleaner in a dry cleaning department and then refused a job consisting of light garage work, stockwork and truckdriving.[29]

Several cases have held that the claimant is reasonably suited for a different job even though the levels of skill involved in the present and former employments are not the same. In *Beecham v. Falstaff Brewing Corp.,*[30] a night watchman who refused a job as a janitor was held to have refused suitable work. The same result occured where a stenographer refused a job as a clerk and typist,[31] a manager of a dress shop would not accept a job as a saleslady in a department store,[32] or a photographic helper would not work as a stock clerk at substantially higher wages.[33]

The latter case raises the question of whether a claimant should be required to accept a job which, although it pays substantially more, involves far less skill than his former employment. An example might be a commercial artist who earned $4,000 a year being offered a job as an inventory clerk at $6,000 a year. It is suggested that the claimant should not be required to accept such a job unless jobs in his

---

27 RD-24892 (Colo. 1964).

28 322 Mass. 345, 77 N.E.2d 413 (1948).

29 Bowman v. Troy Launderers and Cleaners, 215 Minn. 226, 9 N.W.2d 506 (1943).

30 150 Neb. 792, 36 N.W.2d 233 (1949).

31 Boyle v. Corsi, 277 App. Div. 1155, 100 N.Y.S.2d 834 (1950).

32 Grubman v. Unemployment Compensation Bd. of Review, 175 Pa. Super. 488, 107 A.2d 186 (1954).

33 Friedman v. Unemployment Compensation Bd. of Review, 201 Pa. Super. 641, 193 A.2d 676 (1963).

former occupational field are extremely scarce. The mere fact that claimant refuses such a job offer will normally indicate that he himself places a premium on his own experience and ability and considers utilization of his skill more important than higher financial reward. Aside from maintaining the personal pride of the individual himself, it is submitted that maximum utilization of a worker's skills and experience is a desirable end within the framework of the entire economic system. However, it should be remembered that one of the act's primary purposes is to return the worker to the active labor force and too great an emphasis on maximum use of a worker's skills may have the effect of thwarting this aim.

C. *Prior Earnings and Wages in Similar Employments*

The Employment Security Act is designed to preserve as much as possible the present economic status and standard of living of the individual. This goal is indicated by the legislative requirements that the claimant's former wages and wages for similar work in the locality be considered by the agency charged with determining whether the unemployed worker has refused suitable work.[34] Both the prevailing wage rate and the claimant's prior earnings should be considered at the same time, and if the newly offered job falls sufficiently short of either standard, the claimant should not be denied benefits.

In *Industrial Commission v. Brady*,[35] the claimant was a union painter and had earned $2.39 per hour on his previous job with time-and-a-half for overtime work. He refused to interview for a non-union job which would have paid $2.00 per hour without overtime provision. The referee found that the prevailing wage rate in the locality was $2.39 per hour with time-and-a-half for overtime. In holding that the claimant had not refused suitable employment because the wage offered was substantially less favorable than the prevailing wage in the locality for that type work, the court said:

> Assuming other conditions to be equal, it is apparent that where the wage differential amounts to $15.60 per forty-hour week, or $624.00 per year on a forty-week year, such employment . . . was substantially less favorable to the individual than that prevailing for similar work in the locality.[36]

The problem surrounding wage differences and their effect upon the suitability provision will, in many cases, be no more than

---

[34] As is the case with respect to jobs requiring less skill or training than claimant possesses, the length of time during which claimant has been unemployed may be an important factor in considering whether offered remuneration is sufficient. This interrelationship will be discussed in Section (D) *infra*. It should also be appreciated that the problem of adequate wages is most often encountered in those jobs requiring less skill and training since a lower skilled occupation will usually involve less salary.

[35] 128 Colo. 490, 263 P.2d 578 (1953).

[36] *Id.* at 494-95, 263 P.2d at 580.

a calculated value judgment by the court or agency deciding the question. Thus, refusals of employment were held not justified where the difference in salary between former employment and offered employment was eleven cents per hour,[37] where a claimant who had been employed as a research chemist earning $750 per month refused a job as a chemical engineer at $500 per month,[38] and where a claimant who had been employed as a general office worker at $100 per week refused a job as assistant bookkeeper at sixty dollars per week.[39] Conversely, a former seamstress earning $1.10 per hour was justified in refusing a job as a waitress at 62½ cents per hour,[40] and a former packer earning $1.44 per hour could rightfully reject an offer to work as a sales clerk at 60 cents per hour.[41]

Little can be drawn from the above cases other than the fact that a wide range of discretion exists in the agencies and courts when determining whether an offered wage is sufficient. Despite the range of discretion, certain factors might easily be neglected. A situation may arise where a claimant is offered a job for which he will receive compensation commensurate with local standards and prior earnings, yet he may be required to work substantially longer hours to receive the salary. In order to properly compare the wages for each job, both should be converted into a dollar per hour figure. Once this figure has been determined for the two jobs, the wage difference is readily ascertainable. What is most important is the meaning of the wage to the claimant and not merely the salary figure standing by itself.

Another problem may arise where the wage offered conforms to local standards yet it is still not substantial enough to provide the claimant with a living wage. Because of this possibility, it would seem necessary for the agency to look at the claimant's domestic circumstances in deciding the problem. There may be instances where the offered wage would be sufficient to support a claimant with a wife and one child yet at the same time be totally inadequate for a claimant with a large family. By analogy to a case previously discussed, the chemist who is single might properly be required to accept the offer of work as a chemical engineer at $250 less per month than his former job paid. However, if this claimant has ten children and a wife to support, he should probably not be held to have refused suitable work under the same circumstances. To require

---

[37] Claim of Mednick, 270 App. Div. 124, 58 N.Y.S2d 493 (1945).

[38] Lorenzi v. Unemployment Compensation Bd. of Review, 197 Pa. Super. 573, 180 A.2d 84 (1962).

[39] Valentine v. Unemployment Compensation Bd. of Review, 197 Pa. Super. 574, 180 A.2d 85 (1962).

[40] Palmer v. State Bureau of Unemployment Compensation, 19 Ohio Op. 2d 362, 177 N.E.2d 806 (1961).

[41] Merck & Co. v. Unemployment Compensation Bd. of Review, 184 Pa. Super. 138, 132 A.2d 727 (1957).

the latter to accept the job would not only defeat one of the aims of the act but also restrict the claimant's mobility to search for a new job which would provide compensation sufficient to sustain himself and his family.

A question may arise as to what extent fringe benefits should be considered in determining wage suitability. A claimant may be offered a job which falls below the local wage standard yet fringe benefits incident to the employment may have a value sufficient to offset this difference. The mere fact that the fringe benefit has a face value sufficient to compensate for a wage difference should not be considered as controlling. It may not have such a high value to the claimant himself. For example, the claimant may have no interest in a pension plan financed primarily by employer contributions. In some cases the value of such a benefit may be needed by him to support his family adequately. The agency should attempt to ascertain the value of the fringe benefit to the claimant in light of his circumstances and determine its offsetting effect on lower wages in this manner.

### D. *Length of Unemployment and Prospect of Securing Work in Customary Occupation*

Where an offered job involves less skill and lower wages, the courts consider the claimant's length of unemployment and the prospects of his finding similar work in determining whether the job is suitable. Thus, a job may be unsuitable when first offered yet be declared suitable if offered again after a period of unemployment. In *Bayly Mfg. Co. v. Department of Employment*,[42] the Colorado Supreme Court gave some indication as to when a claimant would be required to accept a job at substantially lower pay than what he had previously earned. Claimants had worked in a clothing factory earning between $1.40 and $2.00 per hour. This operation was transferred to another locality and claimants later refused to accept work making overalls in which they could earn only about $1.00 per hour. The court, in remanding to the district court for further findings of fact, said:

> It is clear that the beneficient purposes of the Act do not contain a guaranty that a job offer must be for wages equal to that of the old job in order to be deemed as "suitable" work, but work at a substantially lower wage should not be deemed "suitable" unless a claimant has been given a reasonable period to compete in the labor market for available jobs for which he has the skill at a rate of pay commensurate with his prior earnings. Where the offer is for work at a wage materially lower than the wage previously earned, the claimant may be justified in refusing the offer while seeking

[42] 155 Colo. 433, 395 P.2d 216 (1964).

> employment at a rate of pay commensurate with prior earning capacity, but this right is not without qualification and the claimant is entitled only to a reasonable opportunity to obtain work for which he is fitted by experience and training at a wage rate comparable to that for which he previously worked. . . . Work which may be deemed "unsuitable" at the inception of the claimant's unemployment, and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity.[43]

In a New Hampshire case, claimant's previous job was that of a skilled mender earning $1.04 per hour. After a ten-week period of unemployment, an unskilled job paying sixty cents per hour, which claimant had justifiably refused earlier, was held to be suitable work.[44]

Despite the fact that claimant is allowed a "reasonable" period of time before he will be required to accept work at substantially less wages or skill, the problem of determining what is "reasonable" still exists. Periods of five[45] and of nineteen[46] days have been held insufficient time to discover new work. One solution to the problem might be to set up a sliding scale requiring claimant to accept ten dollars less pay per week after a month of unemployment, twenty dollars less after two months, etc. However, a system such as this would seem to be too inflexible to be workable. For example, the prospect of claimant's obtaining work in his customary occupation should be taken into account, and it would be difficult to devise a uniform scale which could reflect this factor. If claimant X has been unemployed for three months, yet it appears that he has a good chance of receiving work in his customary occupation, he should not be required to take a job in a different occupation involving less skill or lower wages. However, it might be entirely proper to require claimant Y to accept such a job, even though he has been unemployed as long as X, if Y's chances of securing a job commensurate with his skill appear slim.

It is difficult to rationalize the idea that what was once unsuitable work to the claimant is now suitable by the mere fact that a certain amount of time has passed. Rather than accepting a suitable job under these circumstances, the theory seems to be that claimant should accept what is available and quit later when he is able to

---

[43] *Id.* at 441-42, 395 P.2d at 220.

[44] Hallahan v. Riley, 94 N.H. 48, 45 A.2d 886 (1946).

[45] American Bridge Co. v. Unemployment Compensation Bd. of Review, 159 Pa. Super. 77, 46 A.2d 512 (1946).

[46] American Bridge Co. v. Unemployment Compensation Bd. of Review, 159 Pa. Super. 74, 46 A.2d 510 (1946).

[47] Comment, 13 CLEV.-MAR. L. REV. 523, 525 (1964).

find better employment.[47] On its face, this seems like a good idea, but one of its effects will be to severely limit and restrict the claimant in his search for a job commensurate with his ability. It is common knowledge that most employment interviews are helding during working hours, and the claimant, who will in most instances be working during these hours, will not have the time in which to make an adequate and thorough search. The result may often be that the claimant finds himself tied down to a job which is in reality unsuitable without much chance to acquire more favorable employment or at least compete with those who are able to interview and make applications during the day.

Length of unemployment considerations should only arise where wage and skill differentials are involved. If a claimant has refused work for religious, health, or safety reasons, the length of unemployment should not have any impact on his refusal. Those reasons are just as valid in the first as in the tenth week of unemployment.

E. *Distance*

The claimant should not be required to accept a job which is too distant from his home. The practical effect of this guideline is to tell the worker how much commuting he must do, and an unreasonable distance between the claimant's residence and the offered employment renders it unsuitable.[48] As is the case with most of the other guidelines set forth by the legislature, determining what amounts to an unreasonable distance is largely a discretionary matter on the part of the agency.

In one agency decision the claimant was a resident of Denver and refused a job offer in California. The referee held that he had not refused suitable employment in that any job offer which requires a claimant to re-establish his residence outside the state is unsuitable.[49] In a Colorado Supreme Court decision, two coal miners refused to accept work in a mine located about 175 miles from their homes. In reversing the agency, the court held they had not refused suitable employment. The agency had relied on the fact that coal mining was essential to the war effort.[50]

In determining whether the distance is great enough to make the job unsuitable, transportation facilities should be considered carefully. A job thirty-five miles away from claimant's house may not be too far if claimant owns a car or if a good carrier system runs between the two points. However, a job only five miles away should probably be deemed unsuitable if claimant has no transportation of

[48] As a matter of policy, the agency does not require the claimant to relocate for a job.
[49] RD-26001 (Colo. 1965).
[50] Industrial Comm'n v. Lazar, 111 Colo. 69, 137 P.2d 405 (1943).

his own and other means of transportation are not available. Agencies seem to consider the availability of a public transportation system in determining if the distance renders a job unsuitable. In one case a claimant, who was the mother of five children, refused an offer to cook at a hospital sixteen miles away because she had no means of transportation at her disposal. She was deemed not to have refused suitable employment.[51] A claimant in another case refused a job twelve miles away because she had no available transportation. The referee, in holding that she remained eligible for benefits, said that it was not required of a claimant to have her own transportation where no common carrier transportation existed.[52]

F. *Other Circumstances*

In addition to the statutory guidelines, other factors should be considered by the agency in determining whether employment is suitable. One example consists of personal circumstances of the claimant, and although not mentioned in the statute, they should be carefully scrutinized by the agency before making a final determination. In one case, it was held that a woman had not refused suitable employment because the job required that she work at night which would interfere with her domestic commitments.[53] Also, where a claimant failed to apply for an offer of suitable work because of plans, on advice of a doctor, to move her husband to another state she was held to have refused work with good cause.[54]

## CONCLUSION

Unemployed workers frequently are confronted with the dilemma of determining whether or not their refusal of an offered job will result in termination of their unemployment benefit checks. This dilemma is caused by the uncertainty and vagueness inherent in the statutory provisions providing for the forfeiture. Although the statutes usually have guidelines designed to assist the agency in ascertaining the applicability of the provision, the standards themselves are overly broad and, altogether too often, completely nonexistent. Thus, a claimant who has a job offer paying twenty cents less per hour than his former employment and who desires to know the effect of his refusal of the new job will only learn from the statutes that the agency will consider the wage difference in determining if the worker is disqualified for future benefits. Another claimant, who has an especially large family, will search in vain for

[51] RD-2038 (Colo. 1948).
[52] RD-1665 (Colo. 1948).
[53] RD-1421 (Colo. 1947).
[54] RD-8842 (Colo. 1955).

any indication that family size will be considered at all, let alone what importance it will have in the agency decision.

The two hypotheticals above raise separate problems. On the one hand is the situation in which the agency is expressly instructed to take cognizance of specific facts (wage difference), on the other hand is the case in which the agency may or may not consider certain facts (family size) at its discretion. The latter problem warrants further legislative attention. Factors such as the size of the claimant's family, personal domestic commitments, the standard of living the new job will afford the worker, and the religious beliefs of the claimant are not mandatorily reviewed by the agency. Hence it is possible that the agency may overlook them or even apply the disqualification provision in a situation where these factors would justify the job refusal. For these reasons it is suggested that employment security statutes should specify these items in the guidelines to the agencies. Although statutory guidelines may be criticized as being too broad, nonetheless, the claimant is assured that important facts peculiar to him must be studied before forfeiture occurs.

It must be remembered that inclusion of the foregoing factors in the statute would not completely solve the claimant's problem. He would know what facts the agency must consider to determine disqualification, but he would not know exactly when his refusal would be justifiable. The statutory guidelines are general, and rightly so, to provide flexibility in analyzing different fact situations. However, many cases may arise in which the claimant must know the effect of his refusal within a short period of time. For example, the employer may offer the claimant a job requesting that he either accept or reject the offer by a specified time. The statutory guidelines will rarely be adequate to inform him of the effect of a refusal. At the same time, it does the claimant little good to first refuse the job and later be told that his refusal terminates his benefit payments.

Since the legislature cannot anticipate the multifarious situations which will arise under the act and hence cannot be more specific in its guidelines to the agency, an alternative procedure to these guidelines may be desirable. The agency could make available to the claimant forms which request the pertinent information concerning the new job and also the claimant's personal circumstances which the claimant believes might justify his refusal of the job. The agency could then issue what would in essence be an advisory opinion on the effect of such refusal. The opinion should be binding upon the agency unless the claimant has filed false or incomplete information or otherwise defrauded the agency. The purpose of such a procedure should be to inform the claimant of the probable effect

of a refusal as soon as possible to avoid the claimant's loss of both the unemployment benefits and a job.

In last analysis the application of the disqualification provision in unemployment security statutes must rest in the agency. The flexibility present in the current guidelines, supplemented by additional criteria, would assure the worker that his situation would receive fullest consideration. The proposed procedure would assist the worker in deciding whether or not to accept a job before the loss of his unemployment benefits. The end result would be beneficial to the worker in resolving his initial dilemma and would further the purpose of unemployment security acts not only by returning the worker to the active work force as soon as possible but also by placing him in the most suitable job.

*Arthur T. Voss*